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THE

LAW QUARTERLY REVIEW.

EDITED BY

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INDEX OF SUBJECTS.

PAGE

ANIMALS, STATE PROTECTION OF, AT HOME AND ABROAD. By J. E. G. de Montmorency 31

BOROUGH COURTS, ENGLISH. By Sanford D. Cole . . . 376

CAPITAL AND INCOME, THE DIFFERENTIATION OF. By W. Strachan 274

CITIZENSHIP AND ALLEGIANCE, II. By John W. Salmond . 49

COLLEN v. *WRIGHT*, SOME RECENT DEVELOPMENTS OF THE DOCTRINE OF. By Francis R. Y. Radcliffe . . . 364

COUNCIL AND STAR CHAMBER. By A. T. Carter . . . 247

COUNTY COURT JUDGES AND THEIR JURISDICTION. By Ernest Bowen Rowlands 237

DEFAMATION, THE ENGLISH LAW OF. By Frank Carr . 255, 388

FARQUHARSON BROS. & Co. v. *KING & Co.*, A NOTE ON. By Arthur Cohen, K.C. 18

——— By John S. Ewart, K.C. . 159

FRENCH CANADIAN LAW, THE ORIGINS OF THE. By G. S. HOLMESTED 178

HABEAS CORPUS, THE STORY OF THE. By Edward Jenks . 64

HINDU LAW AND ANGLO-INDIAN LEGISLATION. By H. H. Shephard 172

INDIA, EXECUTIVE AND JUDICIAL FUNCTIONS IN. By Eustace J. Kitts 349

INSURANCES OF ENEMIES' PROPERTY. By D. F. Pennant . 289

INTERNATIONAL LAW, THE SOURCES OF. By the Editor . . 418

JEWS, THE EXCHEQUER OF THE. By H. D. Hazeltine . . 305

LAW SCHOOL, THE PURPOSE AND METHOD OF A. By W. Jethro Brown 78, 192

LAWYERS AND THE PUBLIC. By Maurice W. Richmond . . 400

LUNACY IN RELATION TO CONTRACT, TORT, AND CRIME. By Rankine Wilson 21

MARAIS, THE CASE OF. By Cyril Dodd, K.C. . . . 143

MARTIAL LAW. By H. Erle Richards 133

——— HISTORICALLY CONSIDERED. By W. S. Holdsworth 117

——— WHAT IS. By the Editor 152

OUTLAWRY, IS IT OBSOLETE? By H. Erle Richards . . 297

PATENT LAW, THE HISTORY OF IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES. By E. Wyndham Hulme . 280

76918

INDEX OF CONTRIBUTORS.

PAGE

BROWN, W. JETHRO.—The Purpose and Method of a Law School 78, 192
CARR, FRANK.—The English Law of Defamation . . . 255, 388
CARTER, A. T.—Council and Star Chamber 247
COHEN, ARTHUR, K.C.—Note on *Farquharson Bros. & Co.* v. *King & Co.* 18
COLE, SANFORD D.—English Borough Courts 376
DE MONTMORENCY, J. E. G.—The State Protection of Animals at Home and Abroad 31
DODD, CYRIL, K.C.—The Case of Marais 143
EWART, JOHN S., K.C.—*Farquharson* v. *King* 159
HAZELTINE, H. D.—The Exchequer of the Jews 305
HOLDSWORTH, W. S.—Martial Law Historically Considered . . 117
HOLMESTED, G. S.—The Origins of the French Canadian Law . . 178
HULME, E. WYNDHAM.—History of Patent Law in the Seventeenth and Eighteenth Centuries 280
JENKS, EDWARD.—The Story of the *Habeas Corpus* 64
KITTS, EUSTACE J.—Executive and Judicial Functions in India . 349
PENNANT, D. F.—Insurances of Enemies' Property 289
POLLOCK, SIR FREDERICK.—What is Martial Law? . . . 152
———————The Sources of International Law . . 418
RADCLIFFE, FRANCIS R. Y.—Some Recent Developments of the Doctrine of *Collen* v. *Wright* 364
RICHARDS, H. ERLE.—Martial Law 133
———————Is Outlawry Obsolete? 297
RICHMOND, MAURICE W.—Lawyers and the Public 400
ROWLANDS, ERNEST BOWEN.—County Court Judges and their Jurisdiction 237
SALMOND, JOHN W.—Citizenship and Allegiance 49
SHEPHARD, H. H.—Hindu Law and Anglo-Indian Legislation . . 172
STRACHAN, W.—The Differentiation of Capital and Income . . 274
WILSON, RANKINE.—Lunacy in relation to Contract, Tort, and Crime 21

SUBJECTS OF BOOK REVIEWS AND NOTES.

PAGE

Abbott's Law relative to Merchant Ships and Seamen (14th ed. by the late J. P. Aspinall, Q.C., Butler Aspinall, K.C., and H. Stuart Moore) 103

Allen (C. E.) and others.—Questions and answers from the Justice of the Peace, 1877–1896 331

Annual County Courts Practice, 1902 (ed. by His Honour William Cecil Smyly, K.C., and W. J. Brooks) 225

Annual Digest.—*See* Mews (John).

Annual Practice, 1902 (ed. by Thomas Snow, Charles Burney, and Francis A. Stringer) 103

Aspinall (Butler, K.C.).—*See* Abbott.

——— (J. P., Q.C.).—*See* Abbott.

Attenborough (C. L.).—*See* Harris (Seymour F.).

Batut (André).—*See* Dicey (A. V.).

Baxter (J. Sinclair).—*See* Strahan (J. Andrew).

Baynes (W. E. C.).—*See* Underhill (A.).

Beal (Edward).—Yearly Digest of reported Cases, 1901 . . . 226

Bertram (Anton).—*See* Parsons (Albert).

Berwick (T.).—Contribution to an English translation of Voet's Commentary on the Pandects 225, 319

Best (W. M.).—Principles of the law of Evidence (9th ed. by J. M. Lely) 215

Blagden (C. O.).—*See* Underhill (A.).

Bouyssy (S.).—*See* Orlando (V. E.).

Bowstead (W.).—The Law relating to Factories and Workshops 104, 218

——————— The Law relating to Workmen's Compensation 104, 218

Brett (Thomas).—Leading Cases in Modern Equity (4th ed. by J. D. Rogers) 221

Brice (Seward, K.C.).—The Law relating to Tramways and Light Railways (2nd ed. by the author and B. J. Leverson) . . 332

Brooks (W. J.).—*See* Annual County Courts Practice.

Bryce (James).—Studies in History and Jurisprudence . . 104, 211

Burney (Charles).—*See* Annual Practice; Daniell.

Buss (Septimus).—Roman Law and History in the New Testament . 104

Campbell (Robert).—*See* Ruling Cases.

Campbell (Rollo F. Graham).—*See* Peacock (H. St. George).

Cane (Arthur B.).—*See* Revised Reports.

Capron (W. E.).—*See* Wolstenholme (E. P.).

Chalmers-Hunt (D. R.).—The Law relating to Trade Unions . 323, 348

Chitty (Herbert).—*See* Chitty (T. Willes).

Chitty (T. Willes), Chitty (Herbert), and Vizard (P. E.).—Chitty's Forms of Civil Proceedings in the King's Bench Division . . 226

PAGE
Cockburn (J. H.).—The Law of Coal, Coal Mining, &c. 317
Cohen (Herman).—Trade Union Law and Cases 348
Coltman (W. H.).—*See* Key and Elphinstone.
Crankshaw (James).—The Criminal Code of Canada and the Canadian Evidence Act (2nd ed.) 98
Dale (Cecil C. M.).—*See* Daniell and Seton.
Dalhousie Law School, Calendar of 236
Daniell's Chancery Forms (5th ed. by Charles Burney) 92
Daniell's Chancery Practice (7th ed. by Cecil C. M. Dale, C. W. Greenwood, Sydney E. Williams, and Francis A. Stringer) . . 92
De Montmorency (J. E. G.).—State Intervention in English Education 330
De Villiers (J. E. R.).—History of Legislation concerning Real and Personal Property in England during the reign of Queen Victoria 331
Dicey (A. V., K.C.).—Introduction à l'étude du droit constitutionnel (tr. française de André Batut et Gaston Jèze) 104
Dickson (A.).—*See* Key and Elphinstone.
Dowell's Income Tax Laws (5th ed. by J. E. Piper) 322
Duckworth (Lawrence).—Epitome of the Law affecting Marine Insurance 103
Elphinstone (Sir H. W.).—*See* Key and Elphinstone.
Evans (Frank).—*See* Palmer (F. B.).
Farrer (F. E.).—Precedents of Conditions of Sale 318
Fox (J. C.).—*See* Yearly Supreme Court Practice.
Fulton (David).—The Law and Practice relating to Patents, Trade Marks, and Designs 225
Fusion in Victoria 15
Glynne-Jones (A.).—The Companies Acts (3rd ed.) 221
Goldschmidt (W. O.).—*See* Seton.
Gore-Browne (F.).—Elements of Company Law 221
——————— and Jordan (William).—A handy book on Joint Stock Companies (24th ed.) 221
Greenwood (Charles W.).—*See* Daniell.
Hall (A. C.).—Crime in its relation to Social Progress 332
Harriman (E. A.).—The Law of Contracts (2nd ed.) . . 103, 214
Harris (Seymour F.).—Principles of the Criminal Law (9th ed. by C. L. Attenborough) 102
Hein (Ernst).—Die Römer im Kampfe um den Besitz 224
Hood and Challis' Conveyancing and Settled Land Acts (6th ed. by P. F. Wheeler and J. I. Stirling) 438
Hozumi (Nobushige).—Ancestor-Worship and Japanese Law . . 346
Huffcut (Ernest W.)—The Law of Agency 104
Hutchen (David) and Wright (H. C.).—The Land Transfer Acts of New Zealand 104
Indermaur (John).—Manual of the Principles of Equity 225
'Insular Cases,' The, in the U. S. 15

PAGE.

Jenks (Edward).—Essai sur le Gouvernement local en Angleterre (tr. de J. Wilhelm) 103

Jèze (Gaston).—*See* Dicey (A. V.).

Jones (Charles).—The Solicitor's Clerk, Part II (3rd ed.) . . . 226

Jones (Leonard A.).—*See* Ruling Cases.

Jordan (William).—*See* Gore-Browne (F.).

Journal of the Society of Comparative Legislation 114

Kenny (Courtney S.).—A Selection of Cases illustrative of English Criminal Law 101

——————Outlines of Criminal Law . . . 332, 435

Key and Elphinstone's Precedents in Conveyancing (7th ed. by Sir H. W. Elphinstone, W. H. Coltman, and A. Dickson) . . 313

King (W. Tindal).—*See* Seton.

Ledlie (J. C.).—*See* Sohm.

Lely (J. M.).—Statutes of Practical Utility passed in 1901 . . 104

——————————1895–1901 . 332

——————*See* Best (W. M.).

——————*See* Wharton's Law Lexicon.

Leverson (B. J.).—*See* Macey (F. W.) and Brice (Seward).

Lindley (Right Hon. Lord).—A Treatise on the Law of Companies (6th ed. by the Hon. Walter B. Lindley) 332, 430

——— (Hon. Walter B.).—*See* Lindley (Lord).

Little (James Brook).—The Poor Law Statutes . . . 102, 327

Lloyd (C. F.).—*See* Redgrave (A.).

Lumley (W. G.) and Lumley (E.).—The Public Health Acts (6th ed. by A. Macmorran, K.C., and S. G. Lushington) 433

Lushington (S. G.).—*See* Yearly Supreme Court Practice.

——————*See* Lumley (W. G.).

McBarnet (A. C.).—*See* Yearly Supreme Court Practice.

Macey (Frank W.).—Conditions of Contract relating to Building Works (revised as to legal matter by B. J. Leverson) . . 225

Mackenzie (M. Muir).—*See* Yearly Supreme Court Practice.

Macmorran (Alexander, K.C.).—*See* Lumley (W. G.).

Macnaghten (Hon. C., K.C.).—*See* Palmer (F. B.)

——————— (Hon. M. M.).—*See* Rawlins (W. D.).

Maitland (F. W.).—English Law and the Renaissance . . . 98

Mews (John).—The Annual Digest, 1901 226

Mitter (Hara Kumar).—Principles of the Law of Contract . . 103

Moore (H. Stuart).—*See* Abbott.

Mossop (Leonard).—*See* Ruegg (A. H.).

Ontario, Statute Law Revision in (Geo. S. Holmested) . . . 346

Orlando (V. E.).—Principes de droit constitutionnel (tr. par S. Bouyssy) 225

Oxley (J. Stewart).—Light Railways Procedure 226

PAGE
Paine (Wyatt).—Bailments 103, 216
Palmer (F. B.), assisted by Macnaghten (Hon. C., K.C.) and Evans (Frank).—Company Precedents, Part I (8th ed.) . . . 213
Parsons (Albert) and Bertram (Anton).—The Workmen's Compensation Acts 1897 and 1900 . . . . . 225, 324
Peacock (H. St. George) and Campbell (Rollo F. Graham).—The Income Tax Acts 104, 218
Piper (J. E.).—*See* Dowell.
Pipia (U.).—Trattato di Diritto Marittimo 327
Pitt-Lewis (G., K.C.).—*See* Yearly County Courts Practice.
Pollock (Sir F.).—*See* Revised Reports.
Powell (Arthur).—Lawyer's Remembrancer and Pocket Book for 1902 103
Rawlins (W. D., K.C.) and Macnaghten (Hon. M. M.).—Law and Practice in relation to Companies 98
Read (Archibald).—*See* Yearly Supreme Court Practice and Yearly County Courts Practice.
Redgrave (A.).—The Factory Acts (8th ed. by H. S. Scrivener and C. F. Lloyd) 225
——— (9th ed. by same editors) 331
Revised Reports (ed. by Sir F. Pollock, assisted by O. A. Saunders and Arthur B. Cane), vol. LV 332
Revue de droit international 225
Rigg (J. M.).—Select Pleas, &c., from the Rolls of the Exchequer of the Jews (Selden Society Publications) 226, 305
Roberts (J. R.).—*See* Stone's Justices' Manual.
Rogers (J. D.).—*See* Brett (Thomas).
Ross (R. E.).—Procedure of the Supreme Court relating to Firms, Companies, and Societies 220
Ruegg (A. H., K.C.) and Mossop (Leonard).—The Law of Factories and Workshops 226
Ruling Cases (ed. by Robert Campbell, with American Notes by Leonard A. Jones), vol. XXV 104
Safford (Frank) and Wheeler (George).—Practice of the Privy Council in Judicial Matters 96
Saleilles (R.).—De la Déclaration de Volonté 315
——— Les Personnes juridiques dans le Code Civil allemand 432
Salmond (John W.).—Jurisprudence or the Theory of the Law . 332, 431
Sarfatti (Mario).—Captazione 332
Saunders (O. A.).—*See* Revised Reports.
Scrivener (H. S.).—*See* Redgrave (A.).
Selden Society Publications.—*See* Rigg (J. M.).
Senathiraja (E. S. W.).—The Law of Prescription in Ceylon . . 222
Seton's Judgments and Orders (6th ed. by C. C. M. Dale, W. Tindal King, and W. O. Goldschmidt) 92

PAGE

Sigel (Feodor).—Lectures on Slavonic Law 225
Simonson (P. F.).—The Companies Act, 1900, with Commentaries and Forms 104
——— The Law relating to the reconstruction and amalgamation of Joint Stock Companies 219
Smith (C. Manley).—The Law of Master and Servant (5th ed. by E. Manley Smith) 332
Smyly (William C., K.C.).—*See* Annual County Courts Practice.
Snell (Edmund H. T.).—The Principles of Equity 104
Snow (Thomas).—*See* Annual Practice.
Sohm's Institutes, Mr. Ledlie's translation of (Prof. Goudy) . . 115
Stephen (H. L.).—State Trials, Political and Social 224
Stephens (J. E. R.).—Digest of Public Health Cases 332
Stirling (J. I.).—*See* Hood and Challis.
Stone's Justices' Manual . . . for 1902 (ed. by J. R. Roberts) . . 224
Strahan (J. Andrew) and Baxter (J. Sinclair).—A general view of the Law of Property 104
Stringer (Francis A.).—*See* Annual Practice; Daniell.
Taylor (Hannis).—A Treatise on International Public Law . 225, 310
Thayer, James Bradley 105
Underhill (A.), Blagden (C. O.), and Baynes (W. E. C.).—An Encyclopaedia of Forms and Precedents 316
Victoria, Fusion in 15
Vizard (P. E.).—*See* Chitty (T. Willes).
Watson (E. J.).—Pleas of the Crown for the Hundred of Swineshead, &c. 332
Wharton's Law Lexicon (10th ed. by J. M. Lely) 331
Wheeler (George).—*See* Safford (Frank).
Wheeler (P. F.).—*See* Hood and Challis.
White (Sir C. Arnold).—*See* Yearly County Courts Practice.
Wieland (Carl).—Der Wechsel und seine civilrechtlichen Grundlagen 316
Wilhelm (J.).—*See* Jenks (Edward).
Will (J. Shiress, K.C.).—Michael and Will on the Law relating to Gas and Water 97
Williams (Sydney E.).—*See* Daniell.
Wolstenholme (E. P.) and Capron (W. E.).—Conveyancing Forms and Precedents (6th ed.) 436
Wright (E. Blackwood).—The Law of Principal and Agent (2nd ed.) 213
Wright (H. C.).—*See* Hutchen (David).
Wurtzburg (E. A.).—The Law relating to Building Societies (4th ed.) 332
Yearly County Courts Practice, 1902 (ed. by G. Pitt Lewis, K.C., Sir C. Arnold White, and Archibald Read) 225
Yearly Supreme Court Practice, 1902 (ed. by M. Muir Mackenzie, S. G. Lushington, J. C. Fox, A. C. McBarnet, and Archibald Read) 103
Zocco-Rosa, Prof., on the origin of the *sponsio* 346

TABLE OF CASES, 1902.

[*This table includes only recent cases specially noted or discussed.*]

Aldam's Settled Estate, *Re*, 339.
Andrews *v.* Andrews, 341.
Anglesey, Marquis of, *Re*, 13.
Att.-Gen. *v.* Simpson, 7.
Att.-Gen. of Manitoba *v.* Manitoba Licence Holders' Association, 105.
Ayres *v.* Buckeridge, 106.
Bankes, *Re*, 342.
Barnett's Trusts, *Re*, 230.
Bartlett *v.* Tutton & Sons, 106.
Beaumont, *Re*, 235.
Biggar *v.* Rock Life Assurance Co., 343.
Boardman *v.* Scott & Whitworth, 106.
Bond *v.* Barrow Haematite Steel Co., 337.
Bozzelli's settlement, *Re*, 228.
Bradshaw, *Re*, 112.
Brown *v.* Skirrow, 112.
Browne *v.* Brandt, 345.
Budd-Scott *v.* Daniel, 338.
Burrows *v.* Lang, 10.
Bynoe *v.* Bank of England, 107.
Campbell-Davys *v.* Lloyd, 7.
Caridad Copper Mining Co. *v.* Swallow, 337.
Carr *v.* Fracis Times & Co., 228.
Cooper & Crane *v.* Wright, 334.
Davidsson *v.* Hill, 14.
Dovey *v.* Cory, 6, 336.
Duder *v.* Amsterdamsch Trustees Kantoor, 342.
Dunlop Pneumatic Tyre Co. *v.* Actien-Gesellschaft für motor, &c., 107.
Eastern & S. A. Telegraph Co. *v.* Capetown Tramways Co., 335.
Edelstein *v.* Schuler & Co., 344.
Elliot *v.* Pilcher, 12.
Ellis *v.* Wm. Cory & Son, Ltd., 106.
F. *v.* F., 235.
Farquharson, Bros. & Co. *v.* King & Co., 18, 159, 333.
Fergusson's Will, *Re*, 229.
Field *v.* Longden & Sons, 106.
Gentel *v.* Rapps, 114.
George Whitechurch & Co., Ltd. *v.* Cavanagh, 227.
Graham *v.* Public Works Commissioners, 9.
Haedicke and Lipski's Contract, 11.
Harburg India Rubber Comb Co. *v.* Martin, 335.
Herbert *v.* McQuade, 8.
Home & Colonial Stores *v.* Colls, 109.
Hunt *v.* Luck, 108.
Jones *v.* Humphreys, 113.
McDowell *v.* G. W. Ry. Co., 345.
McGrath *v.* Neal & Sons, 107.
Manchester Brewery Co. *v.* Coombs, 11.
Margetts &c. Corporation, *Re*, 14.
Metal Constituents, Ltd., *Re*, 234.
Metropolitan Electric Supply Co. *v.* Ginder, 10.
Michael *v.* Hart & Co., 12.
Nigel Gold Mining Co. *v.* Hoade, 11.
Panhard et Levassor Co.'s Case, 13.
Pearks, &c., Ltd. *v.* Knight, 12.
——— *v.* Ward, 344.
Quinn *v.* Leathem, 1.
Read *v.* Friendly Society of Stonemasons, 234.
R. *v.* Clerkenwell Commissioners, 7.
— *v.* French, 345.

R. *v.* James, 343.
— *v.* Tibbits, 113.
— *v.* Tristram, 231.
Roberts *v.* Brennan, 231.
Sachs *v.* Henderson, 338.
Selot's Trust, *Re*, 229.
Smith *v.* Kerr, 233.
Spurrier *v.* La Cloche, 342.
Sutton *v.* English & Colonial Produce Co., 340.
Tolhurst *v.* Associated Portland Cement Manufacturers, 9.
Van Praagh *v.* Everidge, 339.
Warren *v.* Brown, 109.
Whitbourne *v.* Williams, 13.
Whitechurch & Co., Ltd. *v.* Cavanagh, 227.
Wise *v.* Dunning, 110.
Wright *v.* Glyn, 343.

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NOTES.

WHAT are the legal conclusions to be drawn from the *Mogul Steamship Co.* v. *McGregor* [1892] A. C. 25, *Temperton* v. *Russell* [1893] 1 Q. B. 715, C. A., *Allen* v. *Flood* [1898] A. C. 1, and *Quinn* v. *Leathem* [1901] A. C. 495, 70 L. J. P. C. 76?

The answer to this inquiry can be obtained only by considering these decisions—which may be conveniently referred to as the Conspiracy Cases (though *Allen* v. *Flood* does not in strictness decide any question in regard to conspiracy)—with the calmness of a counsel called upon to advise on a case submitted to him for his opinion. Nor will any one draw the proper inferences from these Conspiracy Cases who does not, in the first place, acknowledge that many of these inferences admit of doubt, and, in the second place, distinguish between conclusions which may be termed, relatively speaking at any rate, certain, and conclusions which are, at best, probable or even in some instances speculative or conjectural.

The Conspiracy Cases, then, establish, to begin with, two most important negative conclusions which may fairly be termed certain. The first of these negative conclusions is that an act which does not in itself amount to a legal injury cannot be actionable merely because it is done with a bad motive (see *Allen* v. *Flood* [1898] A. C. 1, *Stevenson* v. *Newnham* (1853) 13 C. B. 297, and *Quinn* v. *Leathem* [1901] A. C., pp. 508, 509, judgment of Lord Macnaghten). This conclusion is all that *Allen* v. *Flood* does establish. It harmonizes perfectly with *Bradford Corporation* v. *Pickles* [1895] A. C. 587, and negatives the legal validity of judicial dicta with regard to the effect of malice to be found in *Bowen* v. *Hall* (1881) 6 Q. B. D. 333, C. A. and *Temperton* v. *Russell* [1893] 1 Q. B. 715, C. A.

The second of these negative conclusions is that acts done by *X* and *Y*, who are acting in concert, solely for the purpose of protecting and extending their trade and increasing their profits, and which do not involve the employment of any means in themselves

unlawful, are not actionable, even though these acts cause damage to *A*. In other words, trade competition carried out to an extreme length is, even though it cause damage to *A*, not actionable, provided that his competitors are acting solely with the lawful object of securing successes in trade and use no unlawful means (the *Mogul Steamship* case [1892] A. C. 25, pp. 40–44, judgment of Lord Watson, p. 59, judgment of Lord Hannen, and (1889) 23 Q. B. D. iv, pp. 613, 614, judgment of Bowen L.J.).

The positive conclusions to be drawn from the Conspiracy Cases are various, but differ greatly both in certainty and in importance.

The main and most certain of these inferences is that a combination of *X*, *Y*, and *Z* to damage *A* in his trade, and, by means of intimidation or coercion, induce his customers or servants against their will either to break their contracts with him, or not to deal with him, or not to continue in his employment, is, if it results in damage to *A*, actionable (*Quinn* v. *Leathem*).

Interference, in short, with the liberty of one person, *N*, to deal at choice with another person, *A*, is prima facie an interference with the right of *N*, and actionable, and if such interference is intended to damage *A*, and does damage *A*, it is also an interference with the rights of *A*, and gives *A* a right of action against *X* who unlawfully interferes; and if this is so in the case of *X* acting alone, it is so, *a fortiori*, in the case of *X* and *Y*, when acting in concert, with the object of damaging *A*. The same point may be put in another shape. *A* has a right to carry on his own business, as long as he does not break the law, in the way he himself prefers. Hence it is the legal duty of *X* and *Y* not to use intimidation or coercion towards *A* or his customers, with a view to preventing *A* from carrying on his business in the way he chooses (*Lumley* v. *Gye*, *Temperton* v. *Russell*, *Quinn* v. *Leathem*, especially [1901] A. C. pp. 536–538, judgment of Lord Lindley). This appears to be the central position finally established by the judgment of the House of Lords in *Quinn* v. *Leathem*. The appellants in that case, namely certain trade unionists, were liable to an action, not because their *motive* for exercising their own rights was bad or malicious, but because they were pursuing an *object* which in itself was unlawful, namely damage to *A* through the unjustifiable coercion and intimidation of *A*'s customer, *N*, with, be it added, the further and equally unlawful object of punishing *A*'s servants for not having joined a trade union. This distinction between motive and object may be called a fine one, but it is a real distinction and corresponds with the dictates of common sense. [Moreover it is at least as old as Aristotle's Ethics.—F. P.] It exactly differentiates the cases in which *X* and *Y* make an extreme but lawful use of their own rights whereby damage ensues

to *A*, as in the *Mogul* case or in the case of the *Scottish Co-operative Society* v. *Glasgow Fleshers Association* (1898) 35 Sc. L. R. 645, from *Quinn* v. *Leathem*, where the object was to do damage to *A*, and this object was to be attained by coercing *N*, i. e. interfering with *N*'s rights.

From the main principle, however, of *Quinn* v. *Leathem* flow three subordinate conclusions which may be treated as certain, and may be practically as important as the main point decided by the judgment of the House of Lords. These subordinate points may be thus stated.

(1) *Lumley* v. *Gye*, *Bowen* v. *Hall*, and *Temperton* v. *Russell* were rightly decided and are good law at any rate to this extent; that if without legal justification *X* induces *N* to break a contract with *A*, who suffers damage thereby, or if *X* by means of coercion or molestation or threats thereof compels *N* to cease dealing with or remaining in the employment of *A* who is damaged thereby, *X* is liable to an action by *A*, and this is so even though *N*, e. g., in ceasing to deal with *A*, does not break any contract with *A*.

(2) The term coercion or intimidation includes threats not only of bodily harm but also of serious annoyance and damage (*Quinn* v. *Leathem* [1901] A. C. 540, judgment of Lord Lindley).

(3) The Conspiracy and Protection of Property Act, 1875, s. 3, has nothing to do with civil remedies, and the term 'trade dispute between employers and employed' does not include such a transaction as that with which the Courts were called upon to deal in *Quinn* v. *Leathem*.

The above conclusions may, it is submitted, be deduced, if not with absolute certainty yet with considerable confidence, from the Conspiracy Cases. There are several other possible inferences of which we cannot fairly assert more than that they are forcibly suggested by the judgments of the House of Lords.

It would seem, for example, that conduct which if pursued by *X* alone, i. e. without acting in concert with others, is not actionable may nevertheless, if it be the result of concert or agreement between *X* and *Y*, give a right of action to any person, *A*, who is damnified thereby (*Mogul* case [1892] A. C., p. 44, judgment of Lord Bramwell).

This conclusion, however, is not certain; the judgments in *Quinn* v. *Leathem* tend at any rate to diminish the difference between conduct pursued by *X* and *Y* in concert and conduct pursued by *X* when acting without concert with others. True indeed it is that the conduct of *X* and *Y* acting in concert may be actionable whilst what may be called the same conduct when pursued by *X* alone is not actionable. But the reason for this distinction lies apparently far less in the absence or presence of concerted

action than in the fact that there are certain kinds of damage which as a rule cannot possibly be inflicted by one person when acting without concert with others. If it should happen that one man, *X*, could not by means of conspiracy, but through his extensive power and influence, work the same kind of damage to *A* which can in general be achieved only by the combined efforts of *X*, *Y*, and *Z*, it is quite possible that *X* might be liable to an action. 'It was contended that if what was done in this case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by many acting in concert makes no difference. . . . One man without others behind him who would obey his orders *could not have done* what these defendants did. One man exercising the same control over others as these defendants had could have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action.' These are the words of Lord Lindley; they deserve grave consideration.

A careful study of the Conspiracy Cases again may incline a critic to anticipate that the law which regulates the right of association will ultimately be found or made to rest upon the following principles.

First. *X* who intentionally causes *damage* to *A* has prima facie done an *injury* or wrong to *A*, and if *X* can show no legal justification for the damage he has thus intentionally done to *A* he is liable to an action by *A*. 'Intentionally,' says Bowen L.J., 'to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that other person's property or trade, is actionable if done without just cause or excuse' (*Mogul* case, 23 Q. B. D. p. 613, compare [1892] A. C. p. 59, judgment of Lord Hannen). Whence it would seem to follow that if *X* and *Y*, acting together, have intentionally caused damage to *A* they are prima facie guilty of conspiracy and liable to an action by *A*.

Secondly. In an immense number of cases the damage done to *A* by the conduct of *X*, whether acting alone or in concert with *Y*, is on various grounds legally justifiable, and *A*, though damaged, has suffered no *injury*. This is the state of things where *X* and *Y* have done nothing more than exercise their own rights, and have exercised these rights solely in pursuit of a lawful object. This explains the innocence from a legal point of view of the transactions which came before the Courts in the *Mogul* case and the *Scottish Co-operative Society* v. *Glasgow Fleshers Association* (1898) 35 Sc. L. R. 645. The defendants had done no more than exercise their own rights: the object at which they aimed was simply the promotion of their

trade, and this object was, in accordance with the received opinion of modern Englishmen in regard to competition, a lawful object and one the pursuit of which by competitors is of benefit to the public. *A* had suffered damage, but the defendants had not invaded the rights either of *A* or of any other person. Let it, however, be carefully noted that the justification of *X* and *Y* for causing damage to *A* ceases where, though the ultimate object of their conduct may be lawful, as e. g. the promotion of their own trade interests, they try to attain this object by some unlawful means, e. g. the intimidation of *N* whereby he is induced not to deal with their rival *A*.

Quinn v. *Leathem* gives rise to two reflections which go beyond the mere legal effect of the judgment pronounced by the House of Lords.

First. When once the transactions on which *Quinn* v. *Leathem* is based were brought before the Courts, the avoidance of judicial legislation became, under the principles of English procedure, an absolute impossibility. The judgment of the House of Lords has undoubtedly restricted the coercive authority of associations, whether consisting of workmen or of employers. A decision in favour of the defendants would have extended the authority of associations, or in other words have given a legal sanction to something very like boycotting. It is idle to attack the result arrived at by the House on the ground that it is judge-made law, for in whatever way the House had decided their judgment would have amounted to judicial legislation.

Secondly. Critics who assail the judgment pronounced in *Quinn* v. *Leathem* must take up one at least of two positions. They may contend that the conduct of the defendants was not oppressive nor conduct which the law ought in any way to punish. They may again contend that the conduct of the defendants, though oppressive, was justified by some well-known legal principle which the House of Lords was bound to respect. The maintenance of the first of these positions will be opposed to the moral judgment of vast numbers of Englishmen. The maintenance of the second of these positions conflicts with the all but unanimous judgment of two Irish Courts and with the quite unanimous judgment of the House of Lords. Still either or both of these positions may be maintainable; but a serious critic cannot effectually impugn the result of *Quinn* v. *Leathem* by showing that the Courts have not as yet defined with precise accuracy the line which divides the right of individual freedom from the constantly conflicting right of association. A. V. D.

[It may be well to add that the old case of *Garrett* v. *Taylor* (1620) Cro. Jac. 567, is a direct authority for the decision of the House of

Lords. That was an action on the case *against a single defendant* for intimidating the plaintiff's workmen *and customers*. Nothing is said about the origin of the quarrel between the parties. The case is not cited in *Quinn* v. *Leathem*, though possibly covered by Lord Lindley's general allusion to early decisions.—F. P.]

The conscientious director 'qui consulta patrum, qui leges iuraque servat,' has or ought to have an anxious time of it. He finds himself—besides the cares of management that come upon him daily—surrounded with a *cheval de frise* of legal liability. There is the general law of agency, there are the equitable incidents of quasi-trusteeship, and there is the common law action of deceit; and over and above these things inimical to his peace, such special legislation as the Companies Act, 1867, the Directors Liability Act, 1890, and the Companies Act, 1900, positively bristling with penalties. But even a director is not liable for being deceived. If he were it would make his position intolerable, as Lord Hatherley long ago said. Yet this was what was sought to be done in *Cory's* case (*Dovey* v. *Cory* [1901] A. C. 477, 70 L. J. Ch. 753). No moral obliquity of any kind was imputed to the director. The head and front of his offending was an alleged negligence in not having discovered the frauds of others, the chairman and the manager of the company. The rule of 'delegatus non potest delegare' is a salutary one; but it is not capable of strict application in the conduct of a large trading company's business, still less in that of a banking company with a number of branches. Managers and assistant managers, accountants and inspectors, must be employed, and this once conceded, it is a corollary from it that a director is entitled to rely on the statements made by such subordinates in the course of their duties. And this was all that Cory had done. He had been told by the manager that a large number of debts had been provided for, when in fact the debts in question were bad and ought to have been written off as such, and he had accepted those statements with the result that profits were made to appear to have been earned when they had not been earned, and dividends had been paid which never ought to have been paid. But what else was Cory to do? Was he to go into the books of each branch and verify for himself the manager's or assistant manager's accounts? There would be no end to it, if he had. The law is not so unreasonable. It requires diligence in a director, but not superhuman diligence; it does not call on him to perform an impossibility—to supervise personally all the details of business. Confidence must be reposed in subordinates, and a director is entitled to assume

that they are doing their duty properly unless there is something to arouse suspicion. The decision of the House of Lords in the above case recognizes this fully. But it cannot be denied that there is another side to the law so declared, a risk that it may relax the vigilance of directors. Already their chief failing is laches; they are too prone to surrender themselves to their manager as an expert. This is wrong. Directors, though they may accept a manager's statements, must still exercise their independent judgment as business men on all matters that come before the board.

A man who is aggrieved by omission to repair a bridge is not entitled to enter on the land and rebuild the bridge under colour of abating the nuisance. Assuming any right of abatement to exist, it does not extend to active operations such as repairing a bridge. It would be most inconvenient to hold otherwise, for the private abator would be under no control as to the suitability or quality of his work. The proper remedy is by indictment: *Campbell Davys* v. *Lloyd* [1901] 2 Ch. 518, 70 L. J. Ch. 714, C. A.

Attorney-Gen. v. *Simpson* [1901] 2 Ch. 671, 70 L. J. Ch. 828, C. A., contains a curious history of the manner in which the navigation of the river Ouse between St. Neots and St. Ives was regulated by Royal patents or charters, and finally by statute, between 1618 and 1720. There was considerable difficulty in reconciling all these more or less authentic ordinances, one of which was ultimately held by the Court of Appeal never to have taken effect. There is a good deal of mixed learning about the case, but neither the facts nor the result can well be abridged. Note, learned reader, that in local pronunciation, as we have been credibly informed, St. Neots rhymes to 'oats.'

Is it possible to upset a decision in respect of liability to income-tax, given by the General Commissioners of Taxes, by means of prohibition?

This is the question ingeniously raised in *R.* v. *General Commissioners for Clerkenwell* [1901] 2 K. B. 879, 70 L. J. K. B. 1010. The argument in favour of an affirmative answer is, that the Commissioners cannot by an erroneous finding of fact, e. g. that profits apparently made by an American company in the U. S. are really profits made by an English company residing in England, give themselves jurisdiction to assess the English company on profits which are in truth the profits of an American company. The

argument is ingenious, but it has been disposed of in the C. A. by the decision that the Commissioners have jurisdiction to find all the facts as to the profits earned by a person assessed to income-tax, and that, if the decision be wrong in law, it must be attacked by the usual course of an appeal under the Income Tax Acts and the Taxes Management Act, 1880, s. 59. Nor can any one well acquainted with the Income Tax Acts fail to see that the judgment of the C. A. is almost certainly right.

Though there is little reason for questioning the judgment of the C. A. in *R.* v. *General Commissioners for Clerkenwell*, it is worth while understanding why it was that the company assessed adopted an unusual course of procedure, which to the judges of the C. A. did not appear wholly unreasonable. The reason is this: the Commissioners have power to determine all questions of fact, and, unless this power be exercised with great care, their determination may make it all but impossible for a party aggrieved to raise a real and important question of law. If, for example, in the special case which no doubt will ultimately be stated as to the liability to income-tax of the company assessed in *R.* v. *General Commissioners for Clerkenwell*, the Commissioners were to content themselves with simply stating that the profits made apparently by an American company were in fact profits of an English company resident in England, it is difficult to see how the true question of law, namely whether, under the circumstances, the profits of the American company are to be considered in reality profits of the English company, so as to bring the English company within the principle of the *San Paulo Ry. Co.* v. *Carter* [1896] A. C. 31, could be raised before the Courts. This difficulty was obviously felt by the judges of the Court of Appeal, who have clearly intimated an opinion that the duty of the Commissioners is to find strictly the facts on which their decision depends, and not to mix up with their findings inferences of law possibly erroneous drawn by them from the facts.

In a recent case with regard to a claim for income-tax, an eminent judge has been pleased to express himself in the following language. 'This is an unsavoury case. One cannot help seeing that there has been an attempt to wrest a tax out of this public benevolence. It is pressed against a poor and particularly helpless man, and it is only the accident that there is a numerous class of men equally poor and helpless which has enabled him to resist what we have found to be an unfounded claim put forward by the officers of the Crown' (*Herbert* v. *McQuade* [1901] 2 K. B. 761, 773, 70 L. J. K. B. 725).

Has the magistrate who uses this language ever reflected on what his words mean? Does he seriously think that the law officers are really acting as oppressors of the poor? Does he not recognize the fact that it is the absolute duty of the Crown and its officials to exact taxes from all persons, rich or poor, who are bound to pay them, and that to let off *A* is in effect to impose an unfair burden upon *B*? What makes all this fuss and fume the more singular is that the claim of the Crown, whether well founded or not, is pretty clearly supported by a Scottish case, *Inland Revenue* v. *Strang*, 15 Sc. L. R. 704, and that the question which it involved which has been carried before the Court of Appeal, is one which was felt by that Court impossible to decide without further information. The inquiry, in short, whether a beneficed clergyman who received an addition to his very limited income from a society, the object of which was to provide a sustentation fund for beneficed but poor clergymen, was taxable under the Income Tax Act, 1842, s. 146, as 'for perquisites or profits accruing by reason of' his office, is one not easy to answer and pre-eminently fit to be submitted to the Courts.

An action will lie against H. M.'s Commissioners of Public Works and Buildings, who are incorporated by statute, for damages for the breach of a contract entered into by them for the erection of a public building. This is the effect of *Graham* v. *Commissioners of Public Works* [1901] 2 K. B. 781, 70 L. J. K. B. 860.

The result arrived at by the Court, consisting of Ridley J. and Phillimore J., is from a practical point of view so satisfactory that a critic must hope it is good law. But on this matter he will do well not to pronounce a very decided opinion. The two judges arrive indeed at the same conclusion, but they place it on different if not on inconsistent grounds. Ridley J. held that the defendants contracted expressly so as to bind themselves; Phillimore J. that they were incorporated for the very purpose of being liable to be sued on their contracts. In any case *Graham* v. *Commissioners of Public Works*, if rightly decided, goes a good way towards cutting down the rule that an action cannot be brought against a person who contracts merely as agent for the Crown. It certainly raises a speculative question which is worth attention. Is it not desirable that every Government department through which the Crown acts should by some general Act be made a corporation, and be rendered as such corporation liable to be sued in respect of any act which in its corporate capacity it is competent to perform? The degree of responsibility incurred by a Government department

when, for example, it enters into a contract, ought certainly not to be a matter of doubt.

A novel kind of easement was claimed in *Burrows* v. *Lang* [1901] 2 Ch. 502, 70 L. J. Ch. 607, namely a right to take water from the defendant's pond if and when the defendant chooses to leave water in it. Such a claim can be likened only to an action brought on a promise to pay to the plaintiff such reward as the defendant thinks proper; which in truth is no real promise at all. As there is no right of action on a so-called promise 'quae ex voluntate promittentis statum capit,' so there cannot be an easement wholly dependent on the will of the possessor of the alleged servient tenement. Farwell J.'s decision that no such precarious right is known to the law seems wholly in accordance with general principles.

When we request a company established under the Electric Lighting Act, and orders made in pursuance thereof and confirmed by a special Act, to supply us with electric energy, what we really do is to undertake not to get a supply from any other source. The contract is negative, not positive; for the consumer is not bound to use any electric light at all. Hence the consumer can be restrained from going elsewhere for his electric energy during the specified term, unless he can show that the company has unduly preferred other customers, or otherwise failed in its duties: *Metropolitan Electric Supply Co., Ltd.* v. *Ginder* [1901] 2 Ch. 799, 70 L. J. Ch. 862. The authorities which have settled the rule that the substance of covenants is to be looked to, and not merely their affirmative or negative words, were reviewed and applied by Buckley J.

X contracts with *N & Co.*, a company with a small capital and doing a very small business in the manufacture of cement, to supply *N & Co.* for fifty years with 750 tons of chalk per week, and so much more as they might require for their manufacture. *N & Co.* go into voluntary liquidation and transfer all their property to *A & Co.* and purport to assign to *A & Co.* the contract with *X*. *A & Co.* are a very powerful company with a very large capital. *A & Co.* claim to be entitled to the benefit of *X*'s contract with *N & Co.* These are the substantial facts of *Tolhurst* v. *Associated Portland Cement Manufacturers* [1901] 2 K. B. 811, 70 L. J. K. B. 1036. In actions before Mathew J. without a jury, it has been held that *X* was not bound to supply chalk to *A & Co.* The importance of the decision lies in the lucid and broad language in which the

principle is enunciated that an assignment of a contract by one party thereto cannot impose any greater liability on the other party than he originally took upon himself under the contract. 'To my mind it is perfectly clear that [*A & Co.* are] endeavouring to impose upon [*X*] a contract into which he never entered, and that he is entitled to say that he did not make that contract. I cannot accept the contention that only those contracts in which personal confidence or ability is involved cannot be assigned. Whenever, by reason of change of business or change of parties, the result of an assignment would be to impose upon one of the contracting parties a greater liability than he intended to assume, the contract cannot be assigned.' [1901] 2 K. B., pp. 816, 817.

A term in an agreement for the sale of leaseholds that 'the vendor's title is accepted by the purchaser' does not discharge the vendor from the duty imposed by law of disclosing any onerous and unusual covenants contained in the lease. It has uniformly been held that duties of this kind cannot be released by anything short of apt words showing a specific intention to dispense with them. It would encourage sharp practice, if not actual fraud, to hold otherwise: *Haedicke and Lipski's Contract* [1901] 2 Ch. 666, 70 L.J. Ch. 811.

An innkeeper's covenant with his landlord to buy beer exclusively of the landlord is not merely personal, but runs with the reversion; and it is immaterial whether the landlord executed the original agreement, since the reversioner is entitled to specific performance if it has not been executed: *Manchester Brewery Co.* v. *Coombs* [1901] 2 Ch. 608, 70 L.J. Ch. 814. It also seems that the right to sue on such a covenant is a chose in action assignable under the Judicature Act. Farwell J. cited a case before the Judicial Committee (*King* v. *Victoria Insurance Co.* [1896] A.C. 250), where the operation of a similar colonial enactment was extended to a right of action for negligence. It does not appear whether the learned judge intended to express approval of the Judicial Committee's judgment on that particular point.

The Nigel Gold Mining Co. v. *Hoade* [1901] 2 K.B. 849, 70 L.J. K.B. 1006, affords an excellent example of the way in which a vigorous judge cuts through merely technical arguments, and arrives at an obviously right decision by keeping his eye well fixed on the real facts of a case. A Natal joint stock company

had effected a policy of insurance with Hoade, a British subject, with the very object of protecting the gold products of their mine from loss caused by the acts of 'enemies,' and 'arrests, restraints, and detainments of kings, princes, and people.' Shortly after the outbreak of war in the Transvaal gold products coming within the policy of insurance were seized by the Transvaal Government, i. e. the very loss occurred which the Nigel Gold Mining Co. had wished to guard against. On behalf of the insurer the ingenious argument was pressed on the Court that the very outbreak of the war put an end to the policy. Mathew J. refused to give ear to an argument which 'seemed to offer a series of fictions in lieu of plain facts.' The gold products, he laid down, were British goods, they were seized by a hostile force, and the loss was covered by the policy; it was clear therefore that judgment must go in favour of the company.

X & Co., stockbrokers, undertake to buy certain shares on behalf of *A*, which they do, and further to sell them at any time before the settling day when directed to sell by *A*. *X & Co.*, in breach of their contract, sell the shares before the settling day without *A*'s consent. *A* is entitled to recover as damages the highest price which the shares might have realized in the market at any time between the date of the sale and the settling day: *Michael* v. *Hart & Co.* [1901] 2 K.B. 867, 70 L.J. K.B. 1000. This case is a very good exemplification of the general principle that a person who suffers from a breach of contract is entitled to all the advantages which either would have been or might have been his if the contract had been kept by the other party.

Pearks, &c. Lim. v. *Knight* [1901] 2 K. B. 825, 70 L. J. K. B. 1002, and *Elliot* v. *Pilcher* [1901] 2 K. B. 817, 70 L. J. K. B. 795, both show the difficulties which inevitably attend the attempt to protect purchasers against the kind of fraud involved in the adulteration of articles sold to the public. On the whole, however, the decision of the Courts in each case would appear to be satisfactory. *Pearks, &c. Lim.* v. *Knight* shows that a tradesman who sells as butter an article which, however artful the mode in which it had been manipulated, is not substantially the article demanded of him as butter will be liable to a penalty under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6, whilst *Elliot* v. *Pilcher* shows that a tradesman who sells adulterated milk without any reason to suppose it to be adulterated, and has himself purchased it under a warranty that it is pure, will obtain the protection intended to be given him

under s. 25 of the same Act. Whether indeed the complexity of the law existing under the Acts against adulteration is not of itself a great evil; whether it might not have been better, on the one hand, to trust to the maxim *caveat emptor*, or, on the other, if the public are held incapable of protecting themselves from fraud, then to have been a little less careful than the legislature has been to protect the possibly honest tradesman from liability for a fraud of which he is not the originator, are inquiries rather for writers on the sphere of government than for the law courts. Thus much, however, may be said: The Sale of Food and Drugs Act, 1875, and legislation of a similar character, betray the inherent difficulty of any endeavour to identify legal and moral duties.

The *Panhard et Levassor Company's* case [1901] 2 Ch. 513, 70 L. J. Ch. 738, shows that the fraudulent assumption for trading purposes of a name colourably resembling one already well known in the trade can be as effectually dealt with by the Court in the case of companies as in that of individuals. Farwell J. found no difficulty in giving a clear and drastic judgment, and granting injunctions against both the defendant company and its directors personally.

A, a tradesman, has dealings with *X*, a customer. *A* in his yearly accounts always charges *X* with interest on amounts which have been due for three years and longer. *X* makes no objection to the charge for interest, and from time to time makes payments to *A* on the general account. *X* dies. His estate is liable for money due for the price of goods received from *A* and for interest charged thereon in accordance with the course of dealing between *A* and *X* (*In re Henry, Marquis of Anglesey* [1901] 2 Ch. 548, 70 L. J. Ch. 810, C. A.). This would appear to be reasonable enough, and in accordance with the general principle that a person is liable on a tacit contract resulting from his course of dealings with the other party to the contract. The only odd thing is that to arrive at the result arrived at in the case already referred to it was necessary to overrule a quite recent decision (*In re Lloyd Edwards* (1891) 61 L. J. (Ch.) 22).

A master seduces a maid-servant whilst in his service, and she in consequence gives birth to a child. The fact that the seducer is the girl's employer, which in itself aggravates the moral guilt of his conduct, protects him from an action for seduction. This is the effect of *Whitbourne* v. *Williams* [1901] 2 K. B. 722, 70 L. J. K. B. 933, C. A.,

and is a logical deduction from the principle that the action for seduction rests on the loss of service, generally fictitious, occasioned to the person, generally the parent, who is plaintiff in the action. No one can quarrel with the decision of the C. A., but it points towards the conclusion that since the judges cannot entirely get rid of the fiction that the action for seduction depends upon the loss of service, the time has come when the legislature should brush aside the pretences of the law courts and determine on grounds of expediency the conditions under which the action should be maintainable.

A collision occurs upon the high seas between a British and a foreign ship, and owing to the negligence of those in charge of the British ship, *N*, a foreign seaman on board the foreign ship, is killed. Has *A* (who is *N*'s personal representative) under the Fatal Accidents Acts, 1846, 9 & 10 Vict. c. 93, and 1864, 27 & 28 Vict. c. 95, a right of action against the owners of the British ship? Darling J. in *Adam* v. *British and Foreign Steamship Co.* [1898] 2 Q. B. 430, has answered that *A* has no right of action. Kennedy J. and Phillimore J. in *Davidsson* v. *Hill* [1901] 2 K. B. 606, 70 L. J. K. B. 788, have, dissenting from *Adam* v. *British and Foreign Steamship Co.*, held that *A* has a right of action. The language of 9 & 10 Vict. c. 93 appears slightly to favour the view taken by Darling J., but one may be permitted to hope that the broader and more reasonable construction put upon the Fatal Accidents Acts in *Davidsson* v. *Hill* may turn out to be sound. Assuming that *Davidsson* v. *Hill* is well decided, would it not be well for Parliament to put an end to the anomaly established by the *Vera Cruz* (1884) 10 App. Cas. 59, that, while an action *in personam* can be brought against the owner of a ship for loss of life caused by the negligence of his servants in the management of the ship, no action *in rem* can be brought against the ship itself for loss of life so caused? Compare Dicey, Conflict of Laws, pp. 266 and 749.

Is an anchor a part of a vessel? According to popular apprehension we should say it was not. The K. B. D., however, has held that for some purposes an anchor is part of a vessel which is riding at anchor, and that a policy of insurance against damage caused to a tug by a collision with any 'vessel' covers damage caused by striking upon a vessel's anchor to which the vessel was riding attached by a chain (*In re Margetts, &c. Corporation* [1901] 2 K. B. 792, 70 L. J. K. B. 762). Nor is there any reason to doubt that the judgment of the Court is right.

Our learned brethren in the United States are still vigorously discussing the questions raised—it cannot be said that much was decided—in the 'Insular Cases,' as to the constitutional position of the possessions (we purposely use the vaguest term) acquired by reason of the war with Spain. See articles in the *Harvard Law Review*, November and December (Charles E. Littlefield), and the *Columbia Law Review*, November (Carman F. Randolph). It would be presumptuous for us to venture on any comment here until it appears whether any more conclusive decision is likely to be rendered, or any consensus of American opinion to be arrived at.

Fusion in Victoria.

The following interesting communication from Mr. J. R. Maguire, of the Victorian Bar, has been received by a learned friend:

'This letter sets out what seems to me the result of amalgamation in Victoria, and should have been earlier dispatched. As far as its direct purpose is concerned the Legal Professions Practice Act seems to have failed altogether. The two branches of the profession remain distinctly separate. Nearly all the men who, at the passing of the Act, were practising as barristers only, continue to do so and act only on instructions from solicitors, while there is scarcely an instance of a solicitor attempting to perform the double rôle. Individual exceptions exist, but they are few: some who at first were disposed to attempt the double duty have either wholly or practically given up the effort. There is at present (it is not yet a year old) a committee of counsel, consisting of the principal members of the Bar, elected by men who practise solely as counsel, and who have signed a roll. One of the main rules of this association is that no member of it will take a brief along with an amalgam.

'In the County Courts, solicitors not infrequently appear as counsel, but even there the more general practice is to instruct a barrister. In the country men do act in both capacities, but, I think, to scarcely a larger extent than was the case before 1891. The Act has had so little effect on the general practice, that the object of saving expense to the client by one man being employed to conduct a case throughout has scarcely been tested. The men who chose to be amalgams were in no case representative men, and set themselves to charge as much as they could in their respective capacities as counsel and solicitor. A man could not, of course, charge for instructions to himself, nor for instructions from his partner to himself, so that there has been no disposition to do what is done in other colonies (States), viz. form a partnership consisting

of a barrister for court work, and a solicitor for office duty. There is not, so far as I am aware, a single instance in Melbourne of a combination of this kind, though I fancy it obtains to some extent in Ballarat and Bendigo. In one respect, I am told, the Act has enabled not over-scrupulous practitioners to increase costs. Under the old arrangements a solicitor would be chary of marking large fees on counsel's brief, to be paid in the event of success in the action, because he might himself be made responsible to counsel for the amount. Since 1891 men have been known to mark heavy fees on their own briefs on the chance of success, knowing that if they failed, the matter being one between the solicitor and himself as counsel, no harm could be done, and if they won, the client would have to pay the marked fee. It is said, on the other hand, that one reason why amalgamation has had so little effect is, that the scale of costs remains what it was when the branches were separate, and so it pays the solicitor better to employ counsel than to conduct the business throughout himself. Quite recently it has been strongly suggested in the papers that the judges ought to change this, and no doubt it would make a considerable change.

'While the general result has been to produce such slight changes, it seems a little odd to have to say that both the Attorney-General and Solicitor-General in the present Ministry are solicitors who have always practised in that capacity alone. I fancy the new order of things has kept new men from coming to the Bar. There have been very few additions to its numbers during the last nine years. On the other hand, this may be due to other causes, for fewer men are now entering the profession generally: the dearth of litigation is pronounced and opportunities for advancement few. It may be that one of the main influences tending to keep up the separation between the two branches of the profession is the fact that the men at present confining themselves to the one or the other side have gone through a different training for their respective careers. Perhaps when as with the men now coming on, there is only one course for a man, whether he intends to act as a barrister or as a solicitor —when all go through the same mill—the separation may grow less distinct and be superseded by a distinction between specialists and general practitioners. But there is no trace of this at present.

'... There is one thing more. I am disposed to think that the breaking down of the old division, and substitution of one method of qualifying for all members of the profession, will lead to a deterioration in the general culture and intellectual training of lawyers generally. There is a distinct tendency in Victoria to regard no education as of value unless it can be seen to have a more or less distinctly practical result. My experience during the

last two years has convinced me that students are remarkably indifferent to any matter outside the strict limits of purely legal work. They show a surprising ignorance not only of the history of great nations other than their own, but even of the history of England, while of general literature they have scarcely a notion: however they are content with this. The Professor of Law exerts some influence in the contrary direction, but in the main the law school is becoming more and more a technical school in which more attention is paid to practical details than general principles, with the result that the student, having naturally forgotten most of his details and rarely having mastered a principle, reaches the end of his course with very little left. This seems to me a very poor realization of the proper work of a University in legal education. Of course I do not attribute this entirely to the Amalgamation Act; the same thing is observable in other directions in Victoria; but I do think the Act encourages a vicious tendency. It seems a pity that a class of men, in whom generally a respect for learning for learning's sake has (apart from practical results) been maintained, should be in danger of losing that claim on their country's regard.'

ERRATA.

In vol. xvii, p. 344, l. 20 (October, 1901), for *incorporated* read *unincorporated.*

Ib. p. 368, ll. 18, 21, for *Mrs. Fitzgerald* read *Mrs. Fitzherbert.*

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

A NOTE ON *FARQUHARSON BROTHERS & CO.* v. *KING & CO.*[1]

IN the note on the above case in the last number of the LAW QUARTERLY REVIEW, p. 347, it is stated that 'when the Master of the Rolls and Vaughan Williams L.J. take one view and Stirling L.J. another, there is some satisfaction in observing that the difference is really on a matter of fact and not on a principle of law.' I venture to doubt the correctness of that observation, and am desirous of showing that the members of the Court of Appeal differed not merely on a question of fact, but on one of law, and that the questions of law involved in the case are of great importance.

The Master of the Rolls[2] rested his decision entirely upon a legal principle which he stated in the following words ([1901] 2 K. B. at p. 708):

'It is a well known principle of law that whenever one of two innocent persons must suffer by the act of a third person, he who has enabled such third person to occasion the loss must sustain it. I think these words are substantially a sound expression of the law, subject to the qualification that the act which is relied upon as having enabled the third person to occasion the loss must, no doubt, be an act so far connected with the fraud which has caused the loss that it may reasonably be looked upon as bringing about that fraud.'

Williams L.J. was of opinion that a somewhat different qualification ought to be applied to the above-mentioned general principle, the qualification being as his Lordship says at p. 713 of the report: 'that it never ought to be said that a person has within the meaning of the rule done an act which enabled the third person to commit a fraud or occasion a loss, unless the act relied on was one which was intended by the doer of it to be acted upon by somebody.' It is to be further observed that at the trial of the case the learned judge refused to leave any other question to the jury than the question whether the plaintiffs had so acted as by their conduct to have held out their confidential clerk to the defendants as the plaintiffs' agent to sell the goods to the defendants, and on that point the Master of the Rolls says at p. 707: 'It seems to me clear that on the facts proved that question could only be answered, as the jury answered it, in the negative.' But the Master of the Rolls and Williams L.J. were of opinion that another question ought to have been put to the jury, namely, as to whether the plaintiffs did not by their conduct *enable*

[1] [1901] 2 K. B. 697, 70 L. J. K. B. 985, C. A.

[2] Sir A. L. Smith.

their clerk to hold himself out as the owner of the timber or as entitled to dispose of it, and that this question ought to have been answered in the affirmative.

Stirling L.J. thought that the case involved two questions, first, whether the plaintiffs had held out their clerk to the defendants as capable of giving a good title to the timber, and, secondly, whether the plaintiffs were estopped from denying the defendants' title by reason of their negligence or conduct. As regards the first question, his Lordship, in accordance with the judgment of Cockburn C.J. in *Johnson* v. *The Crédit Lyonnais*[1], held that, as there had been no communication between the plaintiffs and the defendants, and as the plaintiffs had no knowledge of what was being done by their clerk, there could be no estoppel by representation, any more than if the clerk had obtained the goods from the Dock Company, had then taken them away to some place of his own and then disposed of them to the defendants.

As regards the second question, his Lordship held, also in accordance with the aforementioned judgment, that, as the plaintiffs owed no duty to the defendants or to the general public in respect of the goods, they could not be estopped by reason of negligent conduct, and he ended his judgment by making the following important observations:

'I desire only to add that I am far from saying the law, as I understand it, with regard to this matter is in a satisfactory state. That the common law on the subject was not satisfactory may be taken as admitted from the fact that the series of Acts called the Factors Acts have been passed to remedy what was considered to be the injustice produced by the common law. If I were free to speculate whether the loss in the present case ought, having regard to considerations of natural equity, to fall on the plaintiffs or on the defendants, it may be that I should be of opinion that it ought to fall on the plaintiffs; but I am bound to act on what I gather the law to be from the authorities on the subject, *and I find myself with regret unable to agree with the other members of the Court as to the effect of these authorities.*'

I hope I have now made it clear by the extracts from the judgments of the three learned judges that they differed not merely on a question of fact, but differed on a question of legal principle; and it appears to me that the question of legal principle which is involved in the case is one of great importance.

It is not uninteresting to notice that the same, or a very similar difficulty and divergency of opinion, may be traced in the views taken by Lord Cairns and Lord Bramwell as to the application or

[1] 3 C.P.D. 32.

effect of the principle of estoppel laid down in *Pickard* v. *Sears* [1], for Lord Bramwell says in the *Colonial Bank* v. *Cady*, 15 App. Cas. at p. 282, that 'with all respect to Lord Cairns, he could not see any ground for applying the doctrine of *Pickard* v. *Sears* in *Goodwin* v. *Robarts*; the plaintiff there was not making any claim inconsistent with anything he had heretofore said or done.' Similarly it may be said that in the case under consideration the plaintiffs did not make any claim inconsistent with anything they had said or done.

As the case of *Farquharson Brothers & Co.* v. *King & Co.* is, I believe, likely to be taken to the House of Lords, I do not propose at present to discuss various very interesting legal questions which arise on a consideration of the judgments from which I have cited extracts, but will content myself with making the following observations.

First, I think it could be shown without much difficulty that the general principle laid down by the late Master of the Rolls, and in some degree assented to by Williams L. J. with reference to the liability of one of two innocent persons for a loss occasioned by the act or fraud of a third, is far too vague and general to be considered as accurately and precisely embodying the English law on the subject.

Secondly, it seems probable that the case might be decided in favour of the defendants in accordance with a principle far less extensive, which is established by *Brocklesby* v. *Temperance Building Society* [2], in the House of Lords, as well as by other cases, namely:

'When the owner of goods has given persons power to dispose of the goods with the intention that those powers should be exercised for that purpose, then he is precluded from asserting his title to the goods as against a third party to whom those persons have sold them and who has purchased them, reasonably believing that such persons had power to dispose of them.'

ARTHUR COHEN.

[1] 6 A. & E. 469; 45 R. R. 538. [2] [1895] A. C. 173.

LUNACY IN RELATION TO CONTRACT, TORT, AND CRIME.

IN a recent number of the LAW QUARTERLY REVIEW (April, 1901)[1], Professor Goudy, in discussing the rule in *Imperial Loan Co.* v. *Stone*, comes to the conclusion that the decision in that case 'can be rested only on the shifting sands of supposed expediency,' and that in fact it seems to run contrary 'to the most fundamental principles of contract law[2].' The rule in question grounds itself on the principle that *knowledge of insanity* must be established 'to enable the lunatic to succeed' in an action on a contract, where the incapacity of the alleged lunatic is sought to be shown. It may be fairly open to argument whether the rule in this case runs in any way counter to the fundamental principles of contract law, which assume the validity of a contract when properly entered into. But, in questioning this view, the position taken by the writer of the article is shown in one of the opening sentences.

Dr. Goudy says: 'Speaking generally, the laws of most civilized countries . . . treat lunatics as wholly irresponsible for their actions[3].' Now, this statement seems to be much too wide, and the truth of it entirely depends on what is to be understood by the term 'lunatic[4].' As the writer of the article says, 'Insanity . . . admits of degrees, and in considering juristic acts . . . these degrees may be of importance[5].' In English law, at all events, lunatics do not seem to be looked on necessarily as wholly irresponsible for their actions, either in regard to contract, tort, or crime[6]; and, when the nature of lunacy is examined, the reason is not far to seek. Lunacy, it is at once apparent, is not regarded under English law as a fixed condition[7]. Dr. Goudy has shown that, in Roman law, it was otherwise; and that, 'similarly the law of Scotland . . . declares persons in a state of insanity . . . to be incapable of . . . any legal act[8].' It is clear that, in each case, the type of insanity contemplated is that of the *furiosus* (madman), or the *fatuus* (idiot), or the *non compos mentis* (imbecile)—regarding

[1] L. Q. R. xvii. pp. 147-54. [2] Ibid. 154. [3] Ibid. 148.
[4] Pope's Law and Practice of Lunacy (2nd edition), 242-4.
[5] L. Q. R. xvii. 147.
[6] Encyclopaedia of the Laws of England, vol. viii, Lunacy, p. 46.
[7] See the judgment of Court of Queen's Bench, delivered by Cockburn C. J., in *Banks* v. *Goodfellow* (1870) L. R. 5 Q. B. 549.
[8] L. Q. R. xvii. 148, 149.

whom there can be no manner of doubt; but that it leaves out of consideration, or sweeps unconsidered into the net of irresponsibility and incapacity, a large class of the insane, who are, in the ordinary sense, neither mad, nor idiotic, nor imbecile, and who, at times and in degrees—to be judged of in each separate instance as it arises—are of normal capacity. The distinction is fundamental: it is whether this or that system of law shall regard lunacy as a fixed condition, complete and indivisible; or whether modern law shall, in the light of science and of civilization, make some advance on the sweeping generalization of the Roman law, and declare that, as insanity may be complete or partial, so may capacity for juristic acts be present or absent according as the law may regard the gravity of the act and the measure of capacity or responsibility attachable to its performance.

If this be a correct representation of the tendency of the English law upon questions pertaining to lunacy, it should not be difficult to frame rules which may leave open a large margin in which freedom of action is possible before capacity ceases and irresponsibility begins. The writer of the article says: 'Lunacy or insanity . . . is a pure jury question; there is no absolute test[1].' But can the question of insanity be determined in this simple way by the verdict of a jury? The varieties or degrees of legal insanity may have but one name; it is nevertheless true 'that the insanity or lunacy which creates disability for one purpose will not necessarily do so for another[2].' Mr. Pope, in his work on lunacy, distinguishes five different criterions of legal sanity and insanity, and whatever the nature of the questions involved, they are not of that simple nature to be stated to a jury as a mere matter of fact.

Speaking generally, then, it may be stated that the laws of civilized nations, in fixing irresponsibility upon lunatics for their actions, have an extremely complicated problem to solve, unless they are content 'to apply the plain canon (of the civil code) that the act of the insane is void.'

As Mr. Pope points out[3], the objections to this course are apparent, and he shows how 'they (i. e. these objections) attracted the attention of the judicial legislators of this country as the growth of its civilization gradually forced them into existence.' The English common law, however, as is its wont, proceeded 'by minute distinctions of cases or formal rules of procedure,' rather than by bold declaration of principle, to engraft subsidiary rules and distinctions on the canon. One may even hazard the proposition that, running through all the cases, the development of a

[1] L. Q. R. xvii. 147. [2] Pope's Lunacy, 20, 21. [3] Ibid. 243, 244.

clearly defined principle may be traced, until the final conclusion is reached that when a person apparently of sound mind enters into a contract, that contract is not to be set aside or avoided merely on the ground that the party pleading incapacity may be proved to have been insane at the time. In thus disposing of the canon derived from the civil code, there is room for assuming that 'lunacy being often not merely intermittent but partial,' even as insanity or lunacy may vary in degree, so may the disability engendered of it vary according to the nature of the acts to be performed. That the common law of England does not now, at all events, follow the Roman law, may be admitted; but even if by the decision in *Imperial Loan Co.* v. *Stone* an exception to this general doctrine of incapacity (of the insane) has been established, it will scarcely be admitted that, by this decision, 'insane persons are declared to be bound by their contracts . . . and that without any reference to the character or degree of the insanity[1].' In the words of Lord Esher M.R.:

'When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about[2].'

The judgment, in effect, declares that in the case of contract, insanity shall not have a disabling force unless the party alleging it was *so insane as not to be capable of understanding what he was about*, and that the test of this shall be, whether the other party can be affected with a knowledge of it. This, it is submitted, is the true meaning of the decision, leaving a person apparently of sound mind free to enter into a contract which is fair and bona fide, and where there is unsoundness of mind, affording a test of capacity which is no less absolute than practically unerring.

It is perhaps not necessary, in this connexion, to enter into the question of lunacy with regard to the contract of marriage. So far as the contract itself is concerned, its validity is apparently to be decided on the same principle as that of any other contract. In the case of *Durham* v. *Durham*[3], Sir J. Hannen (president) says:

'I accept for the purposes of this case the definition (of what constitutes unsoundness of mind) which has been substantially agreed upon . . ., namely, a capacity to understand the nature of the contract, and the duties and responsibilities which it creates. . . .

[1] L. Q. R. xvii. 149, 150.

[2] *Imp. Loan Co.* v. *Stone* [1892] 1 Q. B. p. 601.

[3] [1885] 10 P. D. 80.

I may say this much in the outset, that it appears to me that the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend.... I agree... that a mere comprehension of the words of the promise exchanged is not sufficient. The mind... may be capable of understanding the language used, but may yet be affected by such delusions, or other symptoms of insanity, as may satisfy the tribunal that there was not a real appreciation of the engagement apparently entered into.'

The question of knowledge of the other contracting party is here not material to the issue, but it is conceivable that it might be so, as, for instance, in the case of a clandestine marriage. 'Notice is, of course, relevant as showing the existence of undue influence or fraud, in cases falling short of positive incapacity [1].'

The external standard of incapacity set up in *Hancock* v. *Peaty* [2] has not been approved; it was rejected by the Court of Queen's Bench in the case of *Banks* v. *Goodfellow*, and it may be said to have been finally set aside in the later case of *Durham* v. *Durham* [3]. There can be little doubt that the English Courts of Law would not now regard the judgment in *Hancock* v. *Peaty* as one which 'rests on clear and intelligible principles [4].' It seems to rest on one of two theories—each of which was rejected by Cockburn C.J., in delivering the judgment of the Court in *Banks* v. *Goodfellow* [5]—either the doctrine as expressed by the older jurists, 'that an insane person is incapable... because *he has no mind*,' or the more modern doctrine, which would attach incapacity to all degrees of insanity, because 'of the unity and indivisibility of the mind.'

It is now not 'hard to understand why a different doctrine should be applied to minors [6].' In the case of minors, the policy of the law is, by setting up an external standard of capacity, to protect those who, by reason of inexperience, may need guidance until a certain age; until he has arrived at that age, the law does not credit the minor with complete capacity to contract. But, on the other hand, the law of England (whatever may be the case with the law of Scotland) does not accept the theory of the older jurists that an insane person has no mind. When, therefore, it is asked, 'Why is the minor, who has a limited intelligence, preferred to the lunatic, who has none at all?'—objection may be taken to the form of the question. The analogy between the condition of the lunatic and that of the minor is of the slenderest description; and, such as it is, cannot be adequately expressed in terms of 'limited intelligence.'

[1] Encyclopaedia of the Laws of England, vol. viii. p. 49; cf. Renton's Lunacy, p. 25.
[2] L. R. 1 P. & D. 335, 341.
[3] [1885] 10 P. D. 80; Renton's Lunacy, 19, 20; Encyclopaedia, vol. viii. 49.
[4] L. Q. R. xvii. 152.
[5] (1870) L. R. 5 Q. B. 549.
[6] L. Q. R. xvii. 153.

The law of England properly rejects 'the abstract maxim' that the lunatic is wholly irresponsible for his actions; and in every case, be it with regard to contract, tort, or crime, 'differentiating questions' have been introduced, which have made the nature of the particular insanity alleged important in determining its effect on the act itself[1].

We may then conclude that in relation to contract, at all events, a clearly defined principle has been established, by which the legal capacity of the insane may be ascertained in respect of any particular act, in the simple issue: 'Was the alleged lunatic at the date in question capable of understanding the nature of the act he was performing?' It is no derogation from the force of this principle to say that it has reached its development 'on grounds apparently of equity, or expediency, or convenience of trade[2],' for, as Chief Justice Holmes observes[3], these are 'the very considerations which ... are the secret root from which the law draws all the juices of life, ... considerations of what is expedient for the community concerned.' But the question now arises: can this principle for ascertaining the limit of legal capacity of the insane in the performance of contractual obligations be applied in cases where responsibility comes in for the commission of culpable or criminal acts? In other words, will it be possible to apply a like rule for erecting a standard of responsibility in cases of tort and crime? There seems to be little doubt that in judging of the acts of the insane, whether of capacity for performance or responsibility for commission, the leading question always is: did the alleged lunatic know the nature and consequences of the act he was doing? It is in finding tests for the resolving of this question that the difficulty comes in. In 1892 the Master of the Rolls, in the case of *Hanbury* v. *Hanbury*[4], said that

'He was prepared to lay down as the law of England, that whenever a person did an act which was either a criminal or a culpable act, which act if done by a person with a perfect mind would make him civilly or criminally responsible to the law, if the disease in the mind of the person doing the act was not so great as to make him unable to understand the nature and consequences of the act which he was doing, that was an act for which he would be civilly or criminally responsible to the law.'

We have here two things to consider: (1) the state of mind of the person committing the act, and (2) the essential elements of the act or crime that he was committing. Let us first consider the state of mind of a person in relation to the commission of tortious or criminal acts. There seem to be three well understood states of the

[1] Pope's Lunacy, 17.
[2] L. Q. R. xvii. 150.
[3] The Common Law, p. 35.
[4] 8 Times L. R. 559.

mind which will induce an incapacity of 'remembering that the act is wrong, contrary to duty, and such as in any well ordered society would subject the offender to punishment[1],' these are—negligence, depravity, and what has been called 'mental disease.' We know that negligence is no excuse, that depravity ought not to be an excuse, and that brain disease may be an excuse for the commission of wrongful acts. Brain is the organ of the mind; and disorder of the brain will disturb, or even eventually shut off, communication to and from the mind, along with those 'higher forms of mental activity concerned with the guidance of conduct[2].' We want, then, some criterion by which to judge *when* brain disease has so far advanced as to preclude that 'government of conduct by intelligence,' which is peculiar to man, and by which he leads 'a self-regulated or rational life.' We want to know *at what point* those teachings of common experience, whose function it is to suggest a rule of conduct, and which enable the rational man to make a choice[3], cease to be efficient factors in the minds of the insane. And this leads to the consideration of the act itself.

Let us, secondly, consider the nature of an act for which a person may be called on to account: it may invade a right, or it may transgress a law. The essential elements of such an act are stated to be an exertion of the will, an accompanying state of consciousness, and a manifestation of the will[4]. It is necessary to distinguish between a voluntary act and an involuntary or merely mechanical action. An exertion of the will, accompanied by consciousness, may be accurately described by the term 'volition,' and it is this volition, or conscious exertion of the will, which is the distinguishing feature of a voluntary act. So far as accountability for conduct is concerned, it is with voluntary acts alone that the law has to do[5]. From this analysis it will be seen at what point responsibility ceases and a state of irresponsibility intervenes. It will be at that point where the voluntary acts of a rational being give way to involuntary or mechanical action under the laws of nature, where the 'power to act in accordance with the guidance of intelligence' has given way to 'a nature under the mechanism of cause and effect[6].' Here also it will be seen how clear is the distinction between those states of the mind where a weakening of the will power is no excuse for wrongful acts, and that state of mind where

[1] Pope's Lunacy, 385.
[2] The Relations of Mind and Brain, by Prof. Calderwood, pp. 460, 461, 495, 504.
[3] Holmes, The Common Law, 54–7, 150.
[4] Holland's Jurisprudence, chap. viii.
[5] [This, I believe, is the law. But I know of no positive authority that e. g. a sleep-walker is not answerable for any damage he may do.—Ed.]
[6] Fleming's Vocabulary of Philosophy, 'Will.'

the power of self-determination as a rational being cannot be said to exist. Reference was incidentally made to a failure of capacity engendered of negligence and depravity, as a fruitful source of wrongful acts which do not admit of excuse, for there 'the dictates of intelligence are *consciously* disregarded, and inclination is allowed to rule.'

We have seen, then, that the principle laid down by the late Master of the Rolls, on which he was prepared to act, presents a scientific basis on which to ground an inquiry: for practical purposes, however, we have still to find a ready method by which tests may be applied in each particular case. But here we are met by a difficulty: 'the legal tests of lunacy,' it has been said, 'differ from the medical,' and 'the tests of irresponsibility on the ground of insanity adopted by the English Courts . . . have never been acquiesced in by the medical profession [1].' It will be important to determine whether and in how far these differing views are reconcilable, and our object, in the first place, will be to discover at what point the lines of divergence may be observed. To quote again from the same writers: *as to legal tests*, 'the modern tendency . . . is to consider the question of capacity or responsibility with strict reference to the character of the act which has to be or has been done'; and, *as to medical tests*, 'there should not be a fixed test of responsibility by which every case is to be decided, inasmuch as there are infinite varieties in the forms and degrees of mental derangement, and the question of responsibility depends upon an impartial weighing of every one of the factors in each case. . . . Mere knowledge of the nature and quality of an act, and that it is a wrong act, is not of itself sufficient to establish the moral (and as a consequence the legal) responsibility of the actor . . .; the element of self-control comes in as well as the element of understanding . . .; the right question for consideration . . . is, "the disabling effect of the particular mental disorder in the particular circumstances [2]."' The point of divergence of the two views, so far as here expressed, then, seems to be at this 'element of self-control'; and, before proceeding farther, it will be necessary to take account of the several forms of insanity as distinguished by medical nomenclature. Passing over dementia and mania, in their various phases, as being tolerably well defined, we come to two contested positions which are severally described as 'moral insanity' and 'impulsive insanity,' and it is here that, in ascribing tests of responsibility to the actions of the insane, the chief differences of opinion will probably be found to lie.

We shall now endeavour to show that it is in this very element

[1] Encyc. of Laws of England, vol. viii, articles on Lunacy and Medical Jurisprudence, pp. 47, 340.

[2] Ibid.

of self-control, as applied to the acts of the insane, that the test of responsibility should be sought. But, first, we must learn what the medical authorities have to say about these less clearly defined phases of insanity which have been just mentioned. To quote once more from the same writer on medical jurisprudence, *referring to moral insanity*: 'In most of the forms of insanity already considered [that is, those coming generally under the heads of dementia and mania], alteration of the character and disposition is followed before long by obvious derangement of the intellect, and generally of bodily health as well. But there are cases in which neither physical nor mental capacity appears to be affected, and yet the moral sense is perverted to such a degree that by common consent the person is held to be insane. Whether such perversion should be called moral insanity or moral depravity must be dubious in most cases, as the one passes insensibly into the other without any dividing line, and the difference appears to be only one of degree. This is one of the grounds on which the legal and medical tests of responsibility come in conflict[1].' Again, '*Impulsive insanity* is the name given to a morbid condition of the mind, in which strong or ungovernable impulse to do some irrational act is developed, without delusion or loss of general self-control. It is not the same thing as a sudden outburst of passion, which partakes more of the nature of temporary mania culminating in an explosive act, the result of general loss of self-control. The subject of "impulsive insanity" may consciously resist the impulse and keep it in check for an indefinite time. He may eventually conquer it, or it may at last conquer him, and he obeys its dictates with a perfectly clear vision of the consequences[2].'

Let us consider these cases separately. *In the description given of moral insanity*, it seems to be forgotten that, although it may be hard to determine, even by the medical expert, at what precise moment the border-line between 'moral depravity' and 'moral insanity' has been traversed, yet 'before the law can treat any individual case of insanity, it has to decide whether this precise moment has or has not arrived[3].' Moreover, so far as the law is concerned, this 'dividing-line' is not the question in the case; the question is one of capacity or incapacity, and insanity is not now at all events taken necessarily to implicate incapacity[4]. It is manifest that in cases where 'neither physical nor mental capacity appears to be affected and yet the moral sense is perverted,' the law must require some evidence, beyond common consent or the dubious vaticinations of expert testimony, to show that the person is insane. *In the*

[1] Encyc. of Laws of England, vol. viii. pp. 341-3.
[2] Ibid.
[3] Pope's Lunacy, p. 6.
[4] Encyc. of Laws of England, vol. viii. p. 46.

description given of 'impulsive insanity,' there is perhaps some danger of letting it be forgotten that, when we come to the question of responsibility, we want something to guide us more definite than a state of things that will apply equally well to cases of negligence and ordinary depravity: the negligent or morally depraved person may have an 'ungovernable impulse to do some irrational act ... without delusion or loss of general self-control,' yet we are not disposed to credit either of them with irresponsibility. It has been questioned whether a man may not be responsible for going mad, seeing that certain courses of action tend to induce insanity; and there is nothing in the struggle here depicted of a man consciously resisting for a time an insane impulse and eventually allowing it to overcome him, to show that the communications between mind and brain have become so disturbed by disease as to make him no longer accountable for his actions [1]. The law requires that uncontrollable impulse *per se* shall not be a good exculpatory plea, unless it be proved as a fact to be the result of disease on a mind not capable of choosing [2]. But the psychopathist [3], after challenging the standard of responsibility 'adopted by the English Courts' on the ground that 'the element of self-control comes in as well as the element of understanding,' immediately proceeds to declare these tests to be illusory, for 'self-control may be overpowered by disordered feeling over which reason has no influence.' It may be enough to reply that disordered feeling may be a symptom, although not a conclusive one, of insanity, but it cannot be said that reason and self-control (the loss of which gives rein to the feelings) may be overpowered by disordered feeling, except by the inversion of cause and effect. It is misleading, therefore, to lay down this as a supreme test, for disordered feeling is no more a distinctive mark of insanity than of some other mental states, and it seems to be the distinguishing characteristic of that state of mind which the criminal law is largely employed to restrain. While, then, these opinions of the psychopathists are, for the most part, too vague and shadowy to produce much effect upon the practice of the common law, yet from amidst theory and conjecture the true principle may be picked out, 'to establish the moral (and as a consequence the legal) responsibility of the actor ... the element of self-control comes in as well as the element of understanding [4].'

The conclusion has thus been reached that responsibility ceases where the actor is no longer able to understand the nature and consequences of the act, or where he is no longer under self-control

[1] Calderwood's Relations of Mind and Brain, pp. 493, 486, 461.
[2] Pope's Lunacy, pp. 386, 391.
[3] Encyc. of Laws of England, vol. viii. p. 340. [4] Ibid.

so as to be capable of choosing. The test, then, is that of the power of control: are his reasoning faculties under control so that he can understand; is his will-power under control, so that it may determine his course of action according to the laws of rational life? Responsibility is a consequence of free-will, but when delusion has taken the seat of reason, when the will is but the creature of suggestion, when action is at the call of the 'sensibilities and motive forces of our nature,' then the power of self-control has vanished and irresponsibility has set in.

It is interesting to note that a like conclusion has been reached in the new Queensland criminal code, and in a decision lately reported of Chief Justice De Villiers in the Supreme Court of Cape Colony, where the loss of the power of self-control, owing to mental disorder, is recognized as a valid exculpatory plea[1].

RANKINE WILSON.

NOTE.—A learned correspondent has sent us, almost simultaneously, an account of a case before the Court of Appeal of New Zealand, *Donaghy* v. *Brennan*, 19 N.Z.L.R. 289, where lunacy was set up as a defence to a civil action for assault by shooting the plaintiff with a gun. The jury, under a direction 'that before finding the defendant a lunatic they must be satisfied that he was labouring under disease of the mind to such an extent as to render him incapable of understanding the nature and quality of the act, and of knowing that such act was wrong,' found that the defendant was a lunatic at the time. Both Courts held, notwithstanding a strenuous and exhaustive argument for the defendant, in which our correspondent, Mr. E. Stafford, took part, that this was no excuse from civil liability in the common law, and dissented from Lord Esher's dictum so far as relied on in that application. The result—in accordance with all authority save the one dictum in question—is that, whatever the true limit of civil liability may be, the liability is more extensive than in criminal cases. For my own part I can see nothing unjust or unreasonable in throwing the loss on the lunatic's estate rather than on a wholly innocent plaintiff, especially when we remember that by our law and practice the adequate maintenance of a lunatic's person is in any case a first charge on his estate. The semi-criminal view of tort, which would make the damages not compensation to the plaintiff but a kind of punishment to the defendant (and therefore not proper to be inflicted on a lunatic), need not be considered at this day.—F. P.

[1] *The Standard*, May 3, 1901.

STATE PROTECTION OF ANIMALS AT HOME AND ABROAD.

THE prevention of cruelty to animals is, as a conception of the State, a pure product of the nineteenth century. Nearly every important social change or movement that took place in the century from which we have just parted, had some more or less dim beginnings in the eighteenth century. The State protection of animals from cruelty is a notable exception to this rule. It is true that Sterne, Cowper, Hogarth, Erskine, and others felt strongly on the subject, but neither the sentiment nor the intellect of the eighteenth century has left upon the statute-book the slightest traces of sympathy with the pangs and sufferings of the brute creation. It was not until the first quarter of the nineteenth century had nearly passed away that the conscience of the legislature awakened to the hideous brutality which was the daily lot of the beasts of England. In many cases the legislature had failed to interfere with current abuses of other kinds on the ground that the Common Law of the country could meet the evil. But the Common Law of England does not appear to have contained any provision for the protection of animals, whether wild or domesticated, from the callous cruelty of man[1]. It is true that animals of both classes were the subjects of much legislation and were regarded by the Common Law, but they were regarded merely from the point of view of property, and in the eyes of the law were not more sentient than agricultural implements. Property in animals was, from a very early date, a matter of extreme importance, but it was unaccompanied by protective legislation, and it was not until 1822 that Parliament ordained that a man should be merciful to his beast. Blackstone points out that there could only be larceny at Common Law of animals that 'are reclaimed or confined, and may serve for food.' Under the Norman forest laws, it is true, the beasts of the chase were so strictly preserved that to kill any 'within the limits of the forest was as penal as the death of a man'; and, according to Matthew Paris, King John forbade the capture of birds throughout the whole of

[1] See, however, the opinion of Lord Erskine given in the House of Lords, May 15, 1809. The Common Law of Pennsylvania was stronger than its ancestor in this matter.

England[1]. But these laws were merely designed to confirm the Crown in its right to all game and all beasts and fowl of warren[2]. Private interests were also protected by statute. By statutes of 1360 and 1363 the stealing and concealing of hawks was made a felony; in 1494, partridges, pheasants, and the eggs of hawks and swans were protected; in 1523 the hare was legislated for, and from 1533 water-fowl multiplied in peace. In 1562 fish, deer, and hawks, and in 1581 pheasants and partridges were the subjects of legislation, while in 1604 pheasants, partridges, house-doves, pigeons, hearn, mallard, duck, teal, widgeon, grouse, heath-cock, moor-game, and hares were strictly preserved. These and many later Acts were passed with the sole object of game preservation. The establishment of 'close-seasons' by law had, of course, the same object, though it has an indirect relationship to the idea of prevention of cruelty. The statute of Westminster the Second (1288 A. D.) gave salmon a close-season from 'the Nativity of Our Lady unto St. Martin's Day,' and young salmon 'from the midst of April to the Nativity of St. John Baptist.' This was confirmed in 1389. The Act of 1604 preserved pheasants and partridges, except 'betwixt the Feast of St. Michael the Archangel and the Feast of the Birth of Our Lord God yearly.' The same Act, while practically suppressing all game shooting, allows the destruction of small birds for hawks-meat. An Act of 1609 confirmed the close time for pheasants and partridges, and forbade the pursuit of such birds (as unfit for food) by hawk or dog, from July 1 to August 31. An Act of 1692, 'for the better preserving the red and black game of grouse, commonly called heath-cocks or heath-polts,' forbade the burning, between February 2 and June 24, of 'grig, ling-heath, furze, goss, or fern' upon 'any mountains, hills, heaths, moors, forests, chaces, or other wastes,' under very heavy penalties. A similar provision was made in 1706 with reference to the Forest of Sherwood. An Act of 1710 forbade 'the pernicious practice of driving and taking' water-fowl in the moulting season when 'the flesh is unsavoury and unwholesome' to the prejudice of buyers and to the great damage and decay of the breed. A close-season was therefore established between July 1 and September 1. By an Act of 1737 this close time was enlarged to the period between June 1 and October 1. An Act of 1761 established a close time for partridges between February 12 and September 1, for pheasants between

[1] 'Anno domini MCCIX. Rex Anglorum Johannes ad Natale Domini fuit apud Bristollum, et ibi capturam avium per totam Angliam interdixit' (Matth. Paris, Chronica Majora, vol. ii. p. 524, Rolls Edition, 1874).

[2] As late as by 9 Geo. I, c. 22 (1723) hunting in disguise any fallow deer involved the death penalty (*R.* v. *Davis*, Leach's Cases in Crown Law, vol. i. p. 271). See also 42 Geo. III, c. 107.

February 1 and October 1, heath-fowl between January 1 and August 20, and grouse between December 1 and July 25. A further Act of 1773 made the close time for heath-fowl (black game) the period between December 10 and August 20; for grouse (red game) between December 10 and August 12, and for bustard between March 1 and September 1. It is unnecessary to pursue further these provisions of the game laws. In respect to close periods they were as unconsciously humane as in other respects they were unconscionably brutal.

We might have expected to find on the statute-book early protective legislation in favour of cattle and horses, as they constituted the bulk of personal property in the early Middle Ages, and the horse was a first necessity of gentle warfare[1]. It is not so, save in one abnormal Act intended to meet a monstrous crime. The devilish act of cutting out the tongues of horses and cattle was apparently as common in England in the sixteenth century as was the houghing of cattle in Ireland in the nineteenth century, and it was struck at by the statute 37 Hen. VIII, c. 6, s. 3 (1545) that imposed the penalty of treble damage and £10 to the king, a heavier punishment than it reads on paper. This crime is associated in the Act with the offence of cutting off a man's ears, and is therefore possibly a statute of mercy. If so there is none other before 1822. Horse stealing, a universal and comparatively pleasant vice, became so rampant in the reign of Philip and Mary that it was found necessary to inflict a penalty for an act that was no offence at Common Law. So the Act of 1555 against the buying of stolen horses—an Act still in force despite the existence of Barnet Fair—became law, and this was supplemented by an Act of 1589 which recited that, 'through most countries of this realm, horse stealing is grown so common as neither in pastures or closes, nor hardly in stables, the same are to be in safety from stealing.' These Acts were the natural predecessors of an Act which, while being also a mere property Act, was indirectly an instrument of amelioration. I refer to the Knackers Act, 1786, which recited that the practice of stealing horses, cows, and other cattle, had increased to an alarming extent, and had been facilitated by persons of low condition who kept houses for the purpose of slaughtering horses and other cattle. The Act provided that no person could keep a house for slaughtering 'any horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer,

[1] As to protection as property, see 3 & 4 Edw. VI, c. 19; 5 & 6 Edw. VI, c. 14; 22 & 23 Car. II, c. 7; 9 Geo. I, c. 22; 14 Geo. II, c. 6; 15 Geo. II, c. 34; 31 Geo. II, c. 40; 42 Geo. III, c. 107; and the case *R.* v. *Paty* (1770, Leach's Cases in Crown Law, vol. i, p. 72). The importation of cattle was dealt with by 12 Car. II, c. 4, while 22 Car. II, c. 13 legislates with respect to the encouragement of cattle and horse breeding.

calf, sheep, hog, goat, or other cattle,' without first taking out a licence for that purpose. This was an Act intended to enable owners to identify stolen cattle, and it in no way regulated the conditions of slaughter-houses in favour of the animal; yet its existence was a valuable factor in the subsequent direct legislation for the protection of animals from personal suffering. The first statute for this purpose, 3 George IV, c. 71, was passed on July 22, 1822, and was entitled 'An Act to prevent the cruel and improper treatment of Cattle.' It empowered magistrates to inflict a maximum fine of £5 on persons who 'wantonly and cruelly beat, abuse, or ill-treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle.' It will be noticed that the form of words is much the same as that used in the Act of 1786. This extremely limited Act was followed in 1833 by the statute 3 William IV, c. 19, which enacted that

'Any person who shall, within five miles of Temple Bar, keep or use or shall act in the management or conducting of any premises or place whatsoever for the purpose of fighting or baiting of bears, cock-fighting, baiting or fighting of badgers or other animals, shall on conviction thereof before any one justice of the peace, forfeit any sum not exceeding five pounds.'

This valuable statute, which was passed in the interests of public order and not directly in the interests of suffering animals, only applied to London and the suburbs, but it was soon considered necessary to apply an extended Act to the whole kingdom. This was done in 1835 by statute 5 & 6 William IV, c. 59, which may be called the Magna Carta of dumb animals. The preamble of this epoch-making Act of Parliament opens as follows:

'Whereas frequent accidents arise from improperly driving cattle, and many and great cruelties are practised by improperly driving and conveying to, at, and from public markets and otherwise, as well as in slaughtering and keeping and detaining the same without food and nourishment, to the great and needless increase of the sufferings of dumb animals, and whereby the lives and property of his Majesty's subjects are greatly endangered and injured, and whereas it is expedient . . . to prevent as far as possible the cruel and improper treatment of cattle and other animals.'

The second section of the Act of 1835 provides that any person wantonly and cruelly beating, ill-treating, abusing or torturing 'any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, dog, or any other cattle or domestic animal,' or improperly driving the same, whereby any mischief, damage, or injury is done to any such animal, should be fined, upon conviction, a maximum sum of forty shillings. It will be noticed that this

section applied to all 'domestic animals' and not merely to cattle. The third section, on the ground of cruelty, forbade the use of any pit or place 'for the purpose of running, baiting, or fighting any bull, bear, badger, dog, or other animal (whether of domestic or wild nature or kind), or for cock-fighting,' and made the offence a nuisance punishable by fine. Section 4 created the statutory duty of feeding impounded animals, and thus abolished a source of great cruelty. Sections 7 and 8 dealt with the Knackers Act, 1786: 'Whereas great cruelty is practised by reason of diseased, old, and worn-out horses, sold, or taken to knackers or slaughtermen for the purpose of slaughter, being frequently resold or compelled to work, or kept without sufficient food[1].' The Act provided that such horses must be slaughtered within three days, and in the meantime must be fed, and that every slaughter-house kept for the purpose must be properly licensed under the Act of 1786.

This Act, for the first time, gave the domestic animals of this country a legal status; henceforward the law regarded them, and the rate of growth of public opinion on the subject of cruelty to animals was increased in a marvellous degree by the encouragement which specific legislation gave to that opinion. In 1837 an Act was passed extending to Ireland the Cruelty to Animals Act, 1835, and it is interesting to note that thus protection of animals by the State throughout the three kingdoms only dates from the beginning of the great Queen's reign.

The Knackers Act, 1844, amended the Act of 1786 and imposed a penalty of five pounds on any person who 'shall wantonly or cruelly beat, ill-treat, abuse, wound, or torture any horse or other cattle' on any premises licensed for slaughtering under the Act of 1786. This Act was followed by the Cruelty to Animals Act, 1849, which repealed the Acts of 1835 and 1837 and re-enacted their principles in a more effective form. The practical operation of the Act was carefully defined in the year 1877 in the case of *Murphy* v. *Manning* (2 Ex. Div. 307) which condemned the infliction of pain that does not better fit the animal for the use of man.

The Cruelty to Animals Act, 1854, further extended the rights of animals to protection. In 1839 the use of dogs for purposes of draught had been prohibited within the Metropolitan police district, and the Act of 1854 extended this provision to the whole kingdom from January 1, 1855. This Act also considerably extended the meaning of the term 'animal' as used in the Act of 1849: it defined 'animal' to mean any domestic animal, whether of the kind men-

[1] Lord Erskine in his speech in the House of Lords, on May 15, 1809, refers at length to the hideous cruelty inflicted in this way.

tioned in the previous Act, or of any other kind or species whatever, and whether a quadruped or not, thus including the doubtful class of birds and domestic pets. These definitions have caused some interesting litigation. In the case of *Colam* v. *Pagett* (12 Q. B. D. 66) pet birds were included among 'domestic animals': but in the case of *Aplin* v. *Porritt* ([1893] 2 Q. B. 57) it was held that rabbits that had been netted and kept for some days were not domestic animals within the meaning of the Act. In the case of *Harper* v. *Marcks* ([1894] 2 Q. B. 319) it was held that trained lions were not domestic animals and could not be protected from torture. Mr. Justice Wright, however, considered that certain wild beasts, such as trained leopards, elephants, and otters, could become 'domestic' for the purposes of the Act. The Act of 1900 now protects all wild animals. Before referring to this Act, I must note certain intermediate statutes. By the Malicious Damage Act, 1861, cattle are protected from malicious wounding by heavy penalties, and the same Act protects all birds and beasts which are subjects of larceny or are ordinarily confined or kept for domestic purposes from similar cruelty. The Poisoned Flesh Prohibition Act, 1864, renders it punishable to expose poisoned meat for the purpose of killing dogs or other animals. On the other hand, cattle and sheep are protected from the vicious propensities of dogs by the Dog Act, 1865, which renders the dog-owner liable for injuries. The Drugging of Animals Act, 1876, made it a crime punishable with imprisonment to unlawfully administer poisonous drugs to horses and other animals. The Injured Animals Act, 1894, provides for the slaughter of any horse, mule, or ass, which is so severely injured that it cannot without cruelty be led away.

This slight summary of the legislation on the subject of Prevention of Cruelty to Animals has not included three branches of the question which are of extreme importance. Legislation in favour of animals did not extend to operations ostensibly in the service of science[1]. Such an exemption from the general law was liable to great abuse, and as the result of a Royal Commission the Cruelty to Animals Act, 1876, became law. This Act opens with the following preamble:

'Whereas it is expedient to amend the law relating to cruelty to animals by extending it to the cases of animals which for medical, physiological, or other scientific purposes are subjected, when alive, to experiments calculated to inflict pain.'

The Act forbade the performance on a living animal of 'any experiment calculated to give pain, except subject to the restrictions imposed by this Act,' and these restrictions specified the pur-

[1] *Murphy* v. *Manning*, ubi sup.

poses for which experiments were allowed, and the persons by whom and the conditions under which such experiments could be performed. This article does not purport to deal with the *quaestio vexata* of vivisection. The opinions of experts appear to differ on the question of the scientific necessity of vivisection, and while there is a sufficient weight of scientific evidence of the first rank going to prove that the vivisection of animals is productive of knowledge of great value to the human race, and which cannot be obtained in any other way, it is impossible and undesirable for the sufferings of animals in the service of man to be prohibited by the legislature. The Act of 1900 is a valuable supplement to the Act of 1876 and should be enforced. The second matter to be noticed is the legislation dealing with the diseases of animals. Legislation on this subject began in 1847, and in the succeeding twenty years a large number of Acts became law. These were consolidated by The Contagious Diseases (Animals) Act, 1869. The Act, bearing the same designation, of 1878, practically codified the law on the subject. This statute was subjected to a variety of amendments, and the Diseases of Animals Act, 1894, consolidated the various Acts from 1878 to 1893.

These elaborate Acts, designed for the double purpose of protecting the health and the property of man, play an important though indirect part in the entire idea of State protection of animals. Their strict enforcement has alleviated an immense amount of suffering amongst animals: the spread of disease was generally due to culpable negligence, and the measures taken to prevent such negligence are not the least important of the laws for the prevention of cruelty to animals. The third matter which is ancillary to the main subject, is the protection of animals, not in relation to their position as property, or as objects of sport, but in their position as representatives of species that are either rare or threaten to become rare. The tendency of certain species of birds to become extinct was a matter that aroused legislative interest as early as 1868 when an Act for the preservation of seabirds was passed[1]. In 1872 'An Act for the Protection of certain Wild Birds during the Breeding Season' was passed, and in 1876 'An Act for the Preservation of Wild Fowl' became law. The Wild Birds Protection Act, 1880, was passed on September 7, 1880. It created a close time for wild birds of every kind between the first day of March and the first day of August. It was made an offence to shoot or snare any wild bird during those five months, and with respect to eighty-four scheduled species of birds the offence is visited with a heavier penalty than in

[1] It is said that the consequent multiplication of seabirds has been so great as to threaten the existence of the deep-sea fisheries. See *Quarterly Review*, July, 1901.

other cases. With respect to ordinary birds, the owner or occupier of any land, or any person authorized by him, is exempt from the Act, but such persons are within the Act as regards the scheduled birds. Neither a farmer nor his agent may kill, for example, a nightingale on his land. The Act allowed the Home Secretary to extend or vary the close time of wild birds on the application of the county justices, and a considerable number of Orders have been made dealing with Anglesey, the Isle of Ely, Essex, Huntingdonshire, Lincolnshire, Middlesex, Northumberland, and the Liberty of Peterborough. By the Wild Birds Protection Act, 1881, larks were added to the schedule of birds attached to the Act of 1880, so that it became illegal for any one to kill or capture a lark for five months in the year. The Wild Birds Protection Act, 1894, enabled the Home Secretary, upon the application of a county council, to prohibit the taking or destroying of wild birds' eggs, either generally or with reference to any specified kind of wild bird, within a particular area; and on the representation of a county council to bring any species of wild bird not included in the schedule to the Act of 1880 within the protection of that schedule.

Another Act of an analogous nature is the Sand-Grouse Protection Act, 1888, which was passed 'to provide for the protection of the sand-grouse, in order that it may, if possible, become acclimatized in the United Kingdom.' The Act imposes a penalty on any person who kills, wounds, takes, or exposes for sale, any sand-grouse killed or taken in the United Kingdom. The Hare Preservation Act, 1892, must be referred to as the only Act upon the statute-book which protects an English mammal during the breeding season. The Act recites the fact that inconsiderate slaughter had greatly diminished the number of hares in the kingdom, and forbids the sale of this important article of food during the months of March, April, May, June, or July. Hares, however, may be killed (and presumably eaten) during the close time, though they may not be sold. It seems desirable that all mammals that are indigenous to this country and are rare, or tend to become rare, should be preserved. The wild cat is probably approaching extinction, the badger in certain districts is rare, the black rat is extraordinarily rare, the pole-cat or foumet is not at all common. Other interesting beasts could doubtless be added to this list of animals that are dying out of the land and deserve the protection of the legislature. The various species of eagles and certain rare hawks ought certainly to be protected by means of the machinery provided by the Wild Birds Protection Act, 1894. All these animals, and all other wild animals, are protected from cruelty in captivity by the Protection Act of 1900.

It is necessary to note that there has been from very early times important and continual legislation on the subject of fish. We have seen that as early as the year 1288 a close time was given to salmon. In 1588 an Act was passed 'for the preservation of spawn and fry of fish.' In 1605 there was an Act 'for the better preservation of sea-fish.' It would be wearisome and beside the mark to attempt to enumerate the various fishery Acts. The Salmon Fishery Act, 1861, the outcome of the Royal Commission Report of 1860, repealed as many as twenty-six such Acts, and since 1861 there have been no less than thirteen Acts dealing with fish, apart from special legislation for the protection of sea-fish. The Seal Fishery Act, 1875, protected various species of seals in the Greenland waters, and the Behring Sea Award Act, 1894, gave to fur-seals absolute protection within a zone of sixty miles round the Pribiloff Islands, and a close time in certain areas of the Pacific Ocean. These Acts fulfilled the three conditions, at one or more of which all legislation dealing with animals aims. They were intended to preserve property, to perpetuate a species and to protect from cruelty the individual animal.

The last statute to which I shall refer has, as its object, merely the protection of individual wild animals without respect either to property or to genus. The Wild Animals in Captivity Protection Act, 1900, is an Act for the prevention of cruelty to any captive bird, beast, fish or reptile not included in the Acts of 1849 and 1854. It presumably does not apply to insects: which have as yet only received negative attention in the shape of the Destructive Insects Act, 1877, a statute designed to prevent the introduction into this country of pests such as the Colorado beetle, and the spreading of insects that are destructive to crops. It may be said in passing that the protection of rare and harmless butterflies, moths, beetles, and other insects seems as legitimate an object of legislation as the protection of rare indigenous birds. The Act of 1890, however, has not this end in view; nor does it deal with the killing and preparation of animals for food (a subject requiring special legislation), not with acts allowed by the Vivisection Act, 1876, nor with the hunting of animals in a state of nature. The Act imposes a maximum penalty of three months' imprisonment with hard labour on any person who shall 'by wantonly or unreasonably doing or omitting any act, cause, or permit to be caused, any unnecessary suffering' to any captive, maimed, pinioned, or imprisoned animal, or 'cruelly abuse, infuriate, tease, or terrify it, or permit it to be so treated.' The large number of travelling menageries in the country in which animals are treated with considerable callousness has rendered this Act necessary, and it is to be hoped that it will be enforced against

the proprietors of these shows with a rigorous hand. But the Act has other applications. It is true it does not apply to acts permitted by the Vivisection Act, but it does apply to experiments that purport to be permitted by the statute of 1876, but which, as a matter of fact, are not so permitted. It is probable that the Act applies to pigeon shooting from traps where the pigeon is merely wounded. Apparently it would not apply to the killing of trapped pests so long as no unnecessary suffering were caused. But to starve a trapped rat to death would clearly be an offence.

The weak point in all legislation for the protection of animals is the inadequate means provided for the enforcement of the law. Acts for the protection of wild birds, for instance, are for the most part pious opinions. But pious opinions have at least one value: they create public opinion and a public conscience—a thing more powerful than any statute.

This article would be incomplete without some reference to the movements on the continent of Europe and in the United States of America in favour of ameliorating the conditions of life in the lower creation. It will be interesting to compare France and England at some length in relation to this question. France, and probably all other civilized countries, have one point in common with England in relation to animals. From early times there is legislation to be found relating to animals regarded as property, or as affecting property or social welfare. For instance we find an Ordinance of St. Louis, of the year 1291, that forbids, as a provision of public health, the keeping of pigs in towns, and in the 'Ordonnances du Prévôt de Paris' of February 3, 1348, the rearing of pigs in Paris was forbidden under a penalty of sixty sols, while the carcases of the captured swine were devoted to charitable uses. Similar regulations of various dates may be found with respect to dogs, poultry, and other animals. The Code of 1790 gave the mayors of the country power to protect public health in this matter, and an Ordinance of December 3, 1829, forbade the rearing of certain animals in towns. Moreover, the Napoleonic Code dealt also with the treatment and disposal of animals afflicted with contagious diseases[1]. The law as to damage done by or to animals was completely developed at an equally early date. But none of these laws regarded the inherent quasi-rights of animals to protection from ill-usage and brutality, and even at the present day the right of an owner both to use and abuse his beast is fully recognized, provided that no public scandal or nuisance is thereby created. What was and is true of France was true of all Europe in 1840, a date when the whole Continent was at

[1] Cf. Statute 32 Hen. VIII, c. 13. s. 7.

least half a century behind England in this aspect of civilization. There appears to have been no Continental movement for the protection of animals till about 1840. It was in December, 1841, that Dr. Perner founded at Munich the first Continental society for the protection of animals. The official patron of the association was Prince Edward of Saxe-Altenbourg. 'This Society,' says a report, dated January 11, 1850, to the French National Assembly, 'This Society, admirably managed, served as a model for the numerous associations which have been organized in the north of Europe, and later in Havana and Philadelphia.' On April 3; 1846, a Society for the protection of animals was founded at Paris, with the encouragement of the Government. This Society was dissolved in the Revolution of 1848, but by 1850 it had been re-organized. It might be said that the Continent was not so very far behind England, inasmuch as the first Act for the protection of animals was only passed on the initiative of Mr. Richard Martin in 1822, and the Royal Society for the Prevention of Cruelty to Animals was only founded in 1824. But a closer investigation of the facts shows an earlier origin to the movement in England. Lord Erskine had been agitating on the subject from at least as early as 1790[1]. On May 4, 1802, leave was given to Mr. Dent, General Leland, Lord Granville-Leveson-Gower, and Mr. Sheridan to introduce a Bill into the House of Commons for preventing the practice of bull-baiting and bull-running. It was thrown out on May 24, 1802, on the debate on the second reading by sixty-four votes to fifty-one[2]. This Bill was not, according to Lord Erskine in his speech on his Cruelty to Animals Bill on May 15, 1809, founded on the true principle of kindness to animals, but was advocated on the side issue that it would put an end to sports that led away the servants and labourers of manufacture and husbandry from the service of their masters. It was on this ground supported by Mr. Windham, who strongly opposed the Bill of 1809. But the Bill of 1802 showed that the question of cruelty was in the air, whilst the Society for the Suppression of Vice founded in the same year made the interests of animals a special branch of work. Volume 16 of the Edinburgh Review (1809) contains a justly scathing attack on the methods of this Society, and particularly holds up to ridicule (page 339) the inconsistency of its work in relation to the 'Prevention of Cruelty to Animals.' This phrase thus dates from 1802. Lord Erskine's Cruelty to Animals Bill was introduced into the House of Lords on February 5, 1809. The second reading was carried on May 15. It was introduced into Committee on May 31, and emerged on June 2, limited to

[1] Hansard, vol. xiv, col. 807. [2] Commons Journal, vol. lvii. pp. 400, 498.

beasts of draught and burden. The second reading was moved in the House of Commons on June 12, 1809, by Sir Charles Bunbury and carried. The motion for going into Committee was opposed at great length by Mr. Windham, but was supported by Mr. William Wilberforce and carried by forty votes to twenty-seven. On June 15 Sir Charles Bunbury moved that the House should resume Committee on the Bill, but the motion was lost by thirty-seven votes to twenty-seven, and the Bill was thrown out when within sight of the Royal Assent. Lord Erskine, in his speech on May 15, stated the position of animals before the law as follows:

'Animals are considered as property only: to destroy or to abuse them, from malice to the proprietor or with an intention injurious to his interest in them, is criminal; but the animals themselves are without protection; the law regards them not substantively; they have no rights.'

He considered, however, that public cruelty to animals was, under many circumstances, an indictable offence at Common Law. We shall see directly that the position in England in 1809, and earlier, is still the position in France. Lord Erskine asked the House,

'in the name of that God, who gave to man his dominion over the lower world, to acknowledge and recognize that dominion to be a moral trust. It is a proposition which no man living can deny, without denying the whole foundation of our duties..... They are created for our use, but not for our abuse. Their freedom and enjoyments, when they cease to be consistent with our just dominion and enjoyments, can be no part of their natures; but whilst they are consistent, I say their rights, subservient as they are, ought to be as sacred as our own.'

The preamble, from Lord Erskine's pen, would have taken no low rank among the many stately preambles—such, for instance, as the preamble to the Elizabethan Act incorporating the Universities—that illuminate the dreary waste of the statutes at large. It runs as follows:

'Whereas it has pleased Almighty God to subdue to the dominion, use, and comfort of man, the strength and faculties of many useful animals, and to provide others for his food; and whereas the abuse of that dominion by cruel and oppressive treatment of such animals, is not only highly unjust and immoral, but most pernicious in its example, having an evident tendency to harden the heart against the natural feelings of humanity.'

The principle set forth by this preamble was intended to 'insensibly extend its influence to the protection of everything that has life; by bringing habitually into the view of the mind, the duties of imperfect obligation that it inculcates.' The underlying con-

ception of the Bill was the creation of a popular conscience on the subject:—

'The cruelties which we daily deplore, in children and in youth, arise from defect in education, and that defect in education from the very defect in the law, which I ask your lordships to remedy. From the moral sense of the parent re-animated, or rather in this branch created by the law, the next generation will feel, in the first dawn of their ideas, the august relation they stand in to the lower world, and the trust which their station in the universe imposes on them, and it will not be left to a future Sterne to remind us, when we put aside even a harmless insect, that the world was large enough for both. This extension of benevolence to objects beneath us, become habitual by a sense of duty inculcated by law, will reflect back upon our sympathies to one another, so that I may venture to say firmly to your lordships, that the Bill I propose to you, if it shall receive the sanction of Parliament, will not only be an honour to the country, but an era in the history of the world.'

Surely a remarkable prophecy. Lord Erskine in these glowing words seems to foretell the birth and growth of that chief glory of the nineteenth century—national altruism.

When we turn from the England of 1809 to the France of forty years later we find a very different picture. We have seen that in 1846 a society for the prevention of cruelty to animals had been founded in Paris. In 1849 M. le Général de Grammont began an agitation for legislation. On November 24, 1849, he asked the National Assembly to issue a report on the possibility of a law for the prevention of cruelty, and a Commission was appointed on November 27 to report on the question. The report was laid before the Assembly by M. de Grammont on January 11, 1850, in the name of the Commission. This report was drawn up by MM. de Dampierre, Derriey, Barre, d'Haurincourt, Lherbette, Ceyras, Simonot, Pécoul, Raconchot, de l'Espinay, Durand-Savoyat, Fortoul, Général de Grammont, Jusserand, and de Vaujas. These names may well be recalled to fame, as with two exceptions they were in favour of direct State intervention on behalf of animals. The report briefly sketched the history of the subject in England, where the Royal Society numbered six million members, and pointed out that in Bavaria, Switzerland, and the greater part of the German States similar societies existed, founded on the model of the Munich Society of 1841. The Commission recognized that something had to be done in the way of legislation:—

'La législation française s'est occupée des animaux au point de vue de la propriété; elle garde le silence sur la part de justice et de pitié qui leur est due . . . Il est digne de l'assemblée nationale de s'occuper sans retard d'une loi qui, en adoucissant la condition

des animaux, instruments précieux de notre existence, agents indispensables de nos besoins comme de nos plaisirs, vienne en même temps mettre un terme à des abus aussi contraires à la morale qu'à nos intérêts matériels; prévenir les mauvais traitements, c'est travailler à l'amélioration morale des hommes, à l'amélioration physique des animaux; la douceur, la pitié à leur égard tiennent plus qu'on ne pense à l'humanité, car l'homme dur et cruel envers les animaux le sera pour tous les êtres confiés à son autorité ou à sa protection[1].'

The 'Projet de loi,' or Bill, founded upon this report contemplated the punishment of 'actes de cruauté et mauvais traitement' without limitation as to the place or person of commission. M. de Grammont's Bill was deliberated on March 15, 1850, June 13, and July 2, when it was passed in an entirely different form, though it was and is still known as the 'Loi Grammont.' A radical amendment was moved on July 2 by M. Defontaine, who in speaking to his amendment stated the views as to animals that France has been satisfied with for the last half-century:—

'Comme M. de Grammont, a-t-il dit, je ne veux pas que les mauvais traitements envers les animaux puissent aller jusqu'à des actes choquants de brutalité, mais je ne crois pas non plus que la protection donnée à l'animal doive dégénérer en inquisition envers le propriétaire—Lorsque le mauvais traitement à été très-grave, lorsqu'il a été jusqu'à l'abus, je veux le punir; mais j'exige que cet abus ait été public, parce qu'alors il y a un certain scandale; mais je ne veux pas entrer dans le domicile de chacun et voir ce qu'il y fait. L'intérêt des animaux ne me paraît pas assez grand pour cela.

Une voix. Et dans les abattoirs?

Une autre voix. C'est de la police municipale.

M. Defontaine. Je ne veux donc réprimer que les faits qui, par leur gravité et leur publicité, attaquent la morale publique. Voilà à quoi se borne mon amendement. Je crois qu'en l'adoptant vous protégerez suffisamment les animaux, sans porter atteinte au droit de propriété, *qui consiste à user et à abuser*[2].'

This speech stands out in the most vivid contrast to the speech of Lord Erskine in 1809 with which the French Commission was familiar and which is reflected in their Report. The views of M. Defontaine found favour with the Assembly, and M. de Grammont's principle was abandoned. The Loi Grammont is a mere police law aimed at scandalous brutality in public places. The English example had no effect whatever on the position. The ideas and ideals of the two nations are fundamentally different. This law was not a temporary measure destined to give place to

[1] Jurisprudence Générale, 1850; Dalloz, Part IV, p. 145 footnote (1).

[2] Jurisprudence Générale. 1850; Dalloz, Part IV, p. 145 footnote (2). The italics are introduced by the writer of this article to emphasize the French position.

something higher in the course of years. It is the existing law of France after half a century. It is true that it was passed at a date when France was upon the verge of the Third Empire, and that it reflects accurately the Pharisaism of that period, but nevertheless the legislative activity of more than half a century has left untouched the principle that a Frenchman's right of property in an animal is the right to use and to abuse. Indeed the decisions of the French Courts have tended to weaken the protective influence of even the law of July 2, 1850. By decisions of the Cour de Cassation of January 24, 1891 and February 16, 1895, it was laid down that the Loi Grammont only applied to the owners or persons in charge of domestic animals, and that the law does not apply when the owner is justified by necessity. The result of the first decision is that strangers, save in so far as they are not prohibited by the law of property, may ill-treat domestic animals with impunity. The decision of February 16, 1895, dealt with the question of bull-fights, and with respect to these fights it was held, in deference to a certain volume of public opinion, that within the meaning of the Loi Grammont Spanish bulls are domestic animals, an arena is a public place, picadors and toreadors are responsible as the agents of the owner (though they can scarcely be said to be in charge of the bulls), but that the owner is civilly liable for the penalties imposed on these agents. It has also been held under the Law that a dog is a domestic animal that can only be killed in case of necessity, and that the onus of proof lies on the slayer[1]. But there seems nothing to prevent any person torturing an ownerless dog or other beast in public, while the Loi Grammont in no way prevents the use of dogs for purposes of draught. Apparently, however, local regulations forbidding such use of a dog can be made (if such regulations contribute to the maintenance of good order and public security) by virtue of general powers granted to the Préfet by laws of 1790, 1791, 1837, and 1884 combined[2]. It should be noticed in conclusion that the original Code (Article 452) forbade the destruction of animals by poison or similar culpable means, and punished the crime severely.

This note on the French law will be most usefully concluded by giving the text of the Loi Grammont. It runs as follows:

'2–9 Juill. 1850.—Loi relative aux mauvais traitements exercés envers les animaux domestiques.

'L'Assemblée nationale a adopté la loi dont la teneur suit.

'Article unique. Seront punis d'une amende de 5 à 15 francs, et pourront l'être d'un à cinq jours de prison, ceux qui auront

[1] Tribunal Civil du Vigan, May 20, 1892; Dalloz, P., 93. 2. 37.
[2] Crim. cass., April 2, 1897; Dalloz, P., 1. 253.

exercé publiquement et abusivement de mauvais traitements envers les animaux domestiques.

'La peine de la prison sera toujours appliquée en cas de récidive.

'L'Article 483 du Code pénal sera toujours applicable.'

Brief references to Germany and some other States, as well as to the United States of America, must be made. We have seen that as early (or as late) as 1841 a society had been founded in Munich for the protection of animals. The movement spread rapidly through the German States, and in the first Penal Code of the German Empire —the Code that was extended to Alsace and Lorraine on October 1, 1871—the principle of protection to animals became part of the imperial law. By the twenty-ninth section of the Code, Article 360, sub-paragraph 13, it is enacted that every one shall be fined 150 marks or be arrested: 'Wer öffentlich oder in Aergerniss erregender Weise Thiere boshaft quält oder roh misshandelt.' By this law every one who openly and scandalously torments with a wicked intent, or brutally ill-treats *any* animal is liable, throughout the empire, to a heavy penalty, and it is to be noticed that the penalty is not restricted to the case of domestic animals. This section of the Code, however, clearly does not protect birds (or beasts) from sportsmen. In order partly to meet this difficulty a Bill for the protection of useful birds was introduced into the Imperial Parliament in 1879, and after its second reading it was referred to a Commission of twenty-one members. This Bill was eventually dropped, and was again presented in 1883 but without success. The measure was introduced a third time in 1888 and became law on March 22 of that year, and was gradually adopted by the States. It may be noticed that the kingdom of Wurtemberg had had a similar measure from August 16, 1878, and that as early as 1875 Austria-Hungary and Italy possessed an arrangement by which each agreed to take full measures to protect birds useful to agriculture. The various Powers are appearing to realize that combinations of this kind are necessary for the preservation of birds of passage. The use of dogs for draught purposes appears to be legal throughout Germany. It is also legal in, at any rate, certain cantons of Switzerland. By an Ordinance of Zurich of February 25, 1888, the use of dogs for draught purposes was carefully regulated, the use of stick or whip was forbidden, and no person under fourteen could be in charge of the dog. A general law for the protection of animals was passed in Zurich as early as July 2, 1858, and this law was enlarged by a further Ordinance in 1897. The Canton of Geneva voted 'un règlement de police' on September 24, 1878, for the protection of animals, which deals minutely with the treatment of animals kept

either for use or food. This law compares very favourably with the Loi Grammont. In the Netherlands the law of May 25, 1880, protects all animals useful in agriculture or profitable to the forest lands.

Passing out of Europe it is interesting to note that in British India by a law of March 21, 1890, public cruelty to domestic animals is punished; and that in Egypt by a decree of November 30, 1895, measures are prescribed for the protection of animals.

In the case of America it will serve no object to pass in detail through the legislation of the various States. It must be noted that the legislation of Congress has only interfered in the subject in particular cases where local legislation could not effect the required object. Thus the Act of March 3, 1891, ch. 521 (26 Statutes at large, 833) provided for the safe transport and humane treatment of export cattle from the United States to foreign countries. This did not meet the case of coast-wise trade in cattle. The Act of March 3, 1891, ch. 555 (26 Statutes at large, 1089), however, contains like provisions and also provides for the inspection of live cattle, hogs, and the carcases and products thereof which are the subject of inter-state commerce. On May 7, 1894, was passed an Act to protect the birds and animals in Yellowstone National Park (28 Statutes at large, 73).

A reference to the State of Pennsylvania is interesting because we find that, in the case of that State, the cruel treatment of a horse or other domestic animal is an offence at Common Law. This is an extension of Lord Erskine's view as to the power of the English Common Law on this subject, and seems to suggest that there was an effective protection law in the United States before Martin's Act was passed in England in 1822. The Common Law on the subject was introduced into the Penal Code in 1860 with a view to the completeness of the Code, and as an admonition against the crime[1]. Laws on the subject of cruelty to animals were introduced into the various States at varying dates. Enough, however, has been written on the subject to show the primary and important part played by English-speaking races in the development of this important branch of altruism. An analysis of the position in the English self-governing colonies would confirm this view. If the opinion expressed by Lord Erskine in 1809 is correct, the recognition of the 'right' of animals to justice and mercy must prove a civilizing force of the first magnitude. Recognition or non-recognition of such a 'right' appears to be an outward and visible sign of inner qualities that make for national life or death. It is a remarkable

[1] See *People* v. *Tunsdale*, 10 Abb. Pr. (N. S.) 374, and the Report on the Penal Code, 20.

fact that the Latin races which refuse to recognize such a right are races that have ceased to develop and are failing in power[1]. It matters little whether this right is of the absolute character claimed by M. Édouard Engelhardt, who considers that animals have positive rights sanctioned by a sovereign power and that there is a bond of law between men and animals[2], or whether it is a right which derives its sanction from the human revolt against the mystery of pain; the fact remains that no nation on the upward path shuts out the brute creation from the charmed circle of the moral law. The worship of useful beasts by early nations was an exaggeration of the recognition of their usefulness, but surely it was a nobler instinct that worshipped the winged bull at Nineveh, than that which rejoiced in the Colosseum and to-day rejoices in many a southern amphitheatre at the torture and agony of 'beasts, whose pains are hardly less than ours!'

J. E. G. DE MONTMORENCY.

[1] [If this vague statement means that France and Italy are to be regarded as degenerate nations, I entirely disagree with it.—ED.]

[2] See his recent work 'De l'animalité et de son droit' (Revue de Droit International, 1900, p. 322).

CITIZENSHIP AND ALLEGIANCE.

II. Nationality in English Law.

BY the modern law of monarchical states, the term citizen (*civis*) has been rejected in favour of subject (*subjectus*, *subditus*). There are citizens in France and in the United States of America, but the law and language of England know of subjects only[1]. As an abstract term, to signify the status of a British subject, we cannot use subjection, and are driven, therefore, to speak of nationality in this sense, though in its proper use this word signifies a man's race and descent, not his political status. This use of subject, as the modern equivalent of citizen, is awkward, because in a wider, earlier, and still permissible sense, subject includes any person *subject* to the power and jurisdiction of the state, and therefore a resident alien no less than a subject in the narrower sense. A subject who is a citizen may be distinguished, when distinction is necessary, as a *natural subject*. One who is not a citizen may be termed an *alien subject*.

The disuse of the term citizen is significant of an important change of ideas. It is the direct outcome of the substitution of feudal for Roman conceptions in law and politics. The Romans conceived of the state as an association of fellow-members, incorporated into one body politic or *respublica*. But the principles of feudal monarchy substituted the crown for the *respublica*. The notion of the state as an incorporate community is to this day unknown to English law; there is no *respublica* of which men can be members or citizens. The Crown is a corporation in law; but the nation, the aggregate of the subjects of the Crown, has no recognized legal identity or personality. There is in law no *populus Britannicus*, as there was once a *populus Romanus*. Roman citizens were men bound to one another by the personal bond of fellow-membership of one body; but British subjects are men bound, not to one another, but to a common superior. The term citizen connotes the privilege of common membership of one state; but the term subject connotes the burden of a common subjection to one lord and king. The former idea is natural in a republican form of government, such as that of Rome before the empire, and it arises

[1] The only citizens recognized by English law are municipal, not national. *Civis* has become equivalent to *municeps*, just as *civitas* has been identified with *urbs*.

again, whenever in modern times a republican is substituted for a monarchical government. Yet it must be noted that it was feudal monarchy, and not imperialism, which substituted subjects for citizens. The original conception did not lapse with the fall of republican government at Rome, but endured throughout the empire. The Roman emperor never bore towards the *cives Romani* that personal relation which the feudal king bears towards his subjects. The emperor was simply the supreme magistrate of the state; above him stood the *respublica*, the body politic whose members were those Roman citizens of whom he himself was one.

In English law, subjects, whether natural or alien, are those who owe allegiance to the Crown. By allegiance is meant the feudal obligation of fidelity and obedience due from a vassal to his lord—an obligation which has as its counterpart the duty of protection and guardianship which the lord owes to his vassal. The king is the supreme feudal lord of all the people, as well as of all the land, of England. They are his men, his *fideles*, his faithful. They owe him such fealty as any vassal owes his lord, for he is their *sovereign lord* the king. In the technical phrase of feudalism they are *ad fidem regis*—in the faith of the king. The oath of allegiance is simply a variant of that oath of fealty which binds together lord and vassal in any other case [1].

Allegiance is of two kinds. That which *natural* subjects owe is permanent and personal, while that which is due from alien subjects is merely temporary and local. A natural subject remains bound at all times and in all places; he is permanently entitled to the king's protection, and permanently bound by the bond of fealty. But an alien subject is such only by reason of his residence within the king's dominions; so long as such residence continues he stands within the king's protection, and owes him a correlative allegiance. So long, but so long only, he is the king's subject. Like any other subject he may be guilty of treason. Like any other subject he must obey the king's laws, and submit himself to the royal government and jurisdiction. But he may withdraw himself at any time from all such obligation, and for what he does

[1] The older oath of allegiance ran as follows: 'You shall swear that from this day forward you shall be true and faithful to our sovereign lord the king and his heirs, and truth and faith shall bear of life and member and terrene honour, and you shall neither know nor hear of any ill or damage intended unto him that you shall not defend. So help you Almighty God.' 2 State Trials, 618; Co. Litt. 68 b; Blackstone, i. 368. An interesting account of the oath of allegiance is contained in Sir Frederick Pollock's Essays in Jurisprudence and Ethics, p. 176. It is to be noted that the oath of allegiance is not feudal in its *origin*. The custom of taking an oath of fidelity to the sovereign was known during the Roman Empire, and was adopted by the kings of the barbarians in Western Europe. At a later date, however, the oath became in form and significance essentially feudal. See Fustel de Coulanges, La Monarchie Franque, p. 55.

beyond the realm of England he will not answer to the king of England. The natural subject, on the contrary, can in no way sever the bond of fealty. He possesses an enduring status which he can by no means abandon. *Nemo potest exuere patriam.*

The term allegiance is a comparatively modern corruption of ligeance (*ligeantia*), which is derived from the adjective liege (*ligius*), meaning absolute or unqualified. Allegiance signified originally liege fealty, that is to say, absolute and unqualified fealty, as opposed to that qualified or conditional fealty which a vassal owed and swore to a lord, saving the faith which he owed already to some other lord having superior and prior claims upon him. There is nothing in feudal theory or practice to prevent a man from having more lords than one. In such a case he owes fealty to both; he is *ad fidem utriusque domini.* But he can owe *liege* fealty (*ligeantia*) to one only. He can have two lords, but not two liege lords. This was a fundamental maxim of feudalism. *Unus et idem duorum dominorum homo ligius esse non potest*[1]. The fealty which he owes to one of them is not unqualified; it is subject always to the claim of him who is not only his lord, but his liege lord—of him to whom he owes not merely fealty but allegiance. If enmity and war shall arise between two lords, he who is in the faith of each must adhere to him in whose ligeance he is[2].

Such, then, was the original meaning of allegiance. But as feudalism grew and prospered, binding all men within the kingdom into a hierarchy of lords and vassals, from the king downwards, and as the king made good his position as the sovereign lord of all men within his kingdom, it became clear that there was no liege fealty possible or lawful, save that which was due to the king himself. He was the only liege lord because he was the supreme lord of all. His claim to fidelity and obedience was above all others. All faith or fealty which a man owed to any other lord was subject to that which he owed to his lord the king. 'I become your man from this day forth,' so runs the common oath of fealty, 'for life, for member, and for worldly honour, and shall bear you faith for the lands that I claim to hold of you, saving the faith that I owe unto our lord the king[3].' So it came about that allegiance took on its modern meaning, and came to signify

[1] Forsyth's Cases and Opinions in Constitutional Law, p. 262.

[2] Du Cange, sub voc. Ligius. 'Ligia fidelitas est omnimodo fides quam vassalus domino nemine excepto praestat.—Ligius is dicitur qui domino suo . . . fidem omnem contra quemvis praestat.' Leges Henrici Primi, c. 43, § 6 (Thorpe's Ancient Laws and Institutes, i. 543). 'Quotcumque dominos aliqu's habeat . . . ei magis obnoxius est . . . cujus ligius est.' Bracton, f. 79 b. 'Si inter domines suos capitales oriantur inimicitiae, in propria persona semper stabit cum eo cui fecit ligeantiam.' Craig's Jus Feudale, p. 79.

[3] Pollock's Essays on Jurisprudence and Ethics, p. 179.

exclusively the fidelity due from a subject to his king, he being the only person by whom fidelity of so absolute a sort could be lawfully demanded.

It is clear that so long as the original feudal significance of the term allegiance persisted, an alien subject could not be said to owe allegiance to the English king. For he already owed it to his own king, and a double allegiance was impossible. His true relation to the king of England, in whose dominions he resided, was one of fealty indeed, but not of liege fealty. He was in his faith, but not in his allegiance. The distinction comes out clearly in one of the few passages in which Bracton refers to the matter. He considers the case of a man who owes fealty both to the king of England and to the king of France—who is *ad fidem utriusque regis*. What shall happen, he asks, if war breaks out between these two countries? Which of his two lords shall this man serve? Bracton's answer is that he must serve in person with that king to whom he owes allegiance (*cum eo cui fecit ligeantiam*)[1]. When, however, allegiance came to mean specifically fealty owed to the king, as contrasted with that owed to other lords, this distinction was forgotten; and all who were *ad fidem regis* were said to owe him allegiance, whether they were aliens or subjects. Hence it became necessary to distinguish between two sorts of allegiance—that which is personal, permanent, and absolute, as being due from natural subjects, and that which is merely local, temporary, and qualified, as being due from aliens by reason of their residency, and which in the strict theory of feudalism is not truly allegiance at all.

The acquisition of British Nationality. By what titles, then, does a man become a British subject? What are the sources of permanent allegiance? From what classes of men does the king of England require fealty as being their liege lord? Our law on this point is partly common and partly statutory, and it recognizes five distinct sources of British nationality:—(1) Birth within the dominions of the Crown; (2) Descent from British subjects; (3) Continued residence in a territory after it has been conquered or otherwise acquired by the Crown; (4) The marriage of an alien woman to a British subject; (5) Naturalization, that is to say, an agreement by which an alien is received into the permanent allegiance of the Crown.

The first of these titles, namely, birth in British dominions, is by far the most important. Apart from certain statutory modifications of the older common law, a man's blood and descent are

[1] Bracton, f. 427 b.

irrelevant in this matter. He may be by blood a Frenchman or a Chinaman, but if he first saw the light on British soil he is a British subject. Conversely if he is born beyond the boundaries of the empire, he is judged an alien, though he may be an Englishman by blood and parentage. The rule is not a mere peculiarity of English law. Until limited or abrogated by modern legislation it was the common law of all feudal Europe. It was received in France until the Code Napoléon. 'Les citoyens, les vrais et naturels Français,' says Pothier, 'sont ceux qui sont nés dans l'étendue de la domination française[1].' To this day by the law of Spain all persons are Spanish subjects who are born in Spanish territory[2]. There is no more striking contrast than that which is afforded by this principle, between ancient and modern theories of citizenship. It never entered the head of any Roman that a man of alien parentage should become a *civis Romanus* through the accident of birth in Roman territory, or that a man of Roman blood should forfeit his citizenship by birth beyond the limits of the *pax Romana*. As a test and title of state-membership, descent was in Roman theory everything, and place of birth nothing. Feudalism reversed this principle. It substituted the *jus soli* for the *jus sanguinis*. Modern legislation has restored to some extent the Roman doctrine and re-established in part the claim of the *jus sanguinis*, but in England, at least, the *jus soli* retains to this day the predominant influence which feudal theory conferred upon it.

The *jus sanguinis* has already been sufficiently explained. We have seen that it is the direct and obvious outcome of the relation between citizenship and nationality. A man belonged to the Roman state, because he belonged to the Roman nation. The two things ran together, and the one status was hereditary because the other was. But what explanation are we to give of the *jus soli* which feudalism substituted for the *jus sanguinis*? By what reasoning were feudal lawyers led to sever in this fashion the bond that had hitherto existed between state-membership and nationality? Let us consider the case of a Frenchman born in England, and deemed accordingly to be a natural subject of the king of England. Like all other residents of the realm, he owes fealty to the king whose realm it is, for he stands within the king's protection, and the king will demand fealty from all men who live under the shelter of his laws and government. All such men are his men, and he is their feudal lord. The maxim is: *Protectio trahit subjectionem, et subjectio protectionem*[3]. These two things are

[1] Traité des Personnes et des Choses, § 43.
[2] Civil Code of Spain, § 17.
[3] Case of the *Postnati*, 2 State Trials, p. 614.

necessarily correlative. But why should such fealty amount to *liege* fealty? Why should this Frenchman stand not merely in the faith of the English king, but in his allegiance? Is his allegiance not rather due to the king of France? The answer seems clearly this, that that fealty is liege fealty which is first in order of time. All who are born within the protection of the king of England are his men, and the fealty due by them is and remains liege fealty, because there is no other that has any claim to be preferred before it. This man is of French blood indeed, but he is not yet within the protection of the king of France. When he crosses the Channel, he will carry with him into France the permanent allegiance already imposed upon him, and the faith which he will then owe to the king of France he will owe saving the faith which he owes to his liege and sovereign lord, the king of England. So with the Englishman born in France. He is an alien in England, because from the day of his birth he has been in the exclusive faith and allegiance of the king of France, and no man can have two liege lords. If he comes to the country of his parentage he will then enter into the faith of the king of England, but not into his allegiance.

Title by descent. By the common law no man was a British subject simply because his father was such before him, nor was any man an alien because of alien blood. For in the theory of feudal allegiance the *jus sanguinis* was of no account. By a series of modern statutes[1], however, title by descent has received partial recognition, and British nationality is now inheritable through males for two generations. He whose father or father's father was born within the empire, does now himself inherit the status of a British subject. But in the third generation this heritable quality of the blood dies out, and must be renewed by birth within the dominions of the Crown. To this extent but no further the *jus sanguinis* is recognized by English law side by side with the *jus soli*. Continental legislation has gone much further in rejecting feudal principles in favour of the older doctrines of the Roman law. Every child of a French citizen is himself a citizen wherever born[2], and so also in the laws of Italy and Spain[3].

The chief cause of this recurrence in modern times to older principles is doubtless to be found in the influence of the conception of nationality. Feudalism had in theory severed all connexion between membership of the state and membership of the nation. The king's subjects are all who are received into the king's allegiance, and their nationality matters not at all. Nevertheless in practice the state and the nation tend to coincidence even under

[1] 7 Anne, c. 5; 4 Geo. II. c. 21; 13 Geo. III. c. 21.
[2] Code Civil, § 8.
[3] Italian Civil Code, art. i, § 4; Spanish Civil Code, § 17.

feudalism. Men that are born in England are commonly Englishmen by blood as well as by allegiance; men that are born beyond the seas stand commonly outside the English race, as well as beyond the protection and fealty of the English king. As feudalism fades, and the claims of nationality begin to reassert themselves, the exceptions to this coincidence begin to be recognized as anomalous. It is felt to be unreasonable that a man should by the accident of his place of birth forfeit his membership of the state to which his fathers belonged, and in due time legislation confers partial recognition upon the claims of descent [1].

Title by conquest or acquisition of new territory. If the king of England adds new territories to his dominions, whether by conquest, cession, occupation, or otherwise, the inhabitants of these territories cease to be aliens and become forthwith British subjects. 'The conquered inhabitants,' says Lord Mansfield, 'once received under the king's protection became subjects, and were to be universally considered in this light, and not as enemies or aliens [2].' We have seen already that no such principle was ever accepted by Roman law. The subject provincials of the empire remained *peregrini*. The *civitas Romana* was the exclusive privilege of their conquerors, until or unless it was extended to the conquered by express and voluntary grant. Very different is the doctrine of feudalism. The conquered are forthwith under the protection of him by whose arms they have been subdued. Therefore they are in his faith, and owe him fealty, and this fealty is liege fealty or allegiance, because there is no longer any other lord who has superior claims to their obedience. The edge of the sword has cut the bond of allegiance which formerly subsisted between them and their sovereign. His former subjects no longer stand in his protection, they are no longer his men at all, therefore they are the liege men and natural subjects of their conqueror.

Title by marriage. The common law did not recognize marriage as affecting in any way the nationality of the parties. An alien woman who married a British subject remained an alien none the less, and a woman who was a British subject could not put off her allegiance by becoming the wife of an alien. In this respect our

[1] To this day English law has derogated in no way from the feudal principle that a man of alien parentage born in England is a British subject, save by entitling him on attaining his majority to disclaim the status thus imposed upon him. In England the doctrine of alienage through birth beyond the seas worked special hardship and injustice through the operation of the rule that no alien could inherit English land. The son of an Englishman, if born abroad, could not inherit his father's real estate. A partial remedy was supplied by legislation in the reign of Edward III, 25 Ed. III. 'De natis ultra mare.' See *De Geer* v. *Stone*, 22 Ch. D. 243.

[2] *Campbell* v. *Hall*, Cowp. 204.

law agreed with that of Rome. By the Naturalization Act, 1870, however, it has been provided that a wife shall have the same nationality as her husband.

Title by naturalization. Naturalization is an agreement by which an alien is received into the permanent allegiance of the Crown, and thereby becomes a natural subject. It is of two kinds, for such reception may be effected either by the royal prerogative or by virtue of statutory authority. In the former case it is called denization, and in the latter naturalization in a strict sense. These two methods differ in some respects in their effects, the former being less efficient than the latter, and failing to place a subject by reception on the same level in all respects as a subject by birth. For this and other reasons reception by royal prerogative is now become obsolete in practice.

But how shall a man be received into the allegiance of the king of England when he is already in the allegiance of the king of France? In the strict theory of feudalism this was clearly inadmissible; for no man can have two liege lords. Bracton allows that a man may be *ad fidem utriusque regis*, but it is to one of them only that he owes allegiance[1]. Yet on the other hand, if a man shall so far forget his duty to his liege lord as to swear allegiance to another, shall he not be bound by his oath? If he undertakes to serve two masters, shall he not be held to his bargain? If the obligations which he has thus taken upon himself are inconsistent with each other, is it not to his own act that he must attribute the evil case in which he finds himself? A double allegiance was irregular *de jure*, but it may well have been possible *de facto*. And however this may have been in the days when feudal doctrine was still well remembered, there is no doubt that at the present time a man may be the natural subject of two states at once. This result is brought about, partly by the naturalization of aliens, and partly by the operation of the compromise now accepted in all states between the principle of the *jus soli* and that of the *jus sanguinis*. The son of a Frenchman, if born in England, is by the *jus soli* a British subject, and by the *jus sanguinis* a citizen of France. The Naturalization Act, 1870, has been careful, however, to provide to some extent against the existence of double allegiance. The reception of a British subject into the allegiance of a foreign state extinguishes his British nationality *ipso jure*; no alien naturalized in England is to be deemed a British subject while in the country of his original allegiance, so long as by the law of that country he remains a subject of it; and a man who is a British subject by the

[1] Bracton, f. 427 b.

jus soli, and a foreigner by the *jus sanguinis*, may make his election between these two conditions.

The loss of British nationality. A person may cease to be a British subject in four different ways: (1) Residence in territory lost to the Crown of England by conquest, rebellion, cession, or otherwise; (2) Naturalization in a foreign state; (3) The marriage of a woman to an alien; and (4) Declaration of alienage.

'Allegiance,' it has been said, 'by the English law is correlative with protection; and where the sovereign can no longer *de jure* protect his subjects, their allegiance ceases. Upon this principle allegiance is changed by conquest, or by cession of territory under a treaty[1].' Therefore on the establishment and recognition of the independence of the United States of America, the inhabitants of that country lost their British nationality and became aliens[2]. Similarly, when Hanover was lost to the British Crown on the accession of Queen Victoria, the Hanoverians ceased at the same time to be British subjects[3]. In all such cases however, the inhabitants have an election between the old citizenship and the new. If they forthwith leave the territory of their residence and take up a new abode within the dominions of the Crown, they will retain their old allegiance[4], for no man will be rejected from his allegiance without his own consent.

Save in manner aforesaid, no one could by the common law free himself from the fealty which he owed to his sovereign. The maxim was: *Nemo potest exuere patriam*—Once a subject always a subject. The Naturalization Act, 1870, has, however, all but abolished this principle of indelible nationality. Any man is now free to throw off his allegiance to the Crown by becoming naturalized in any foreign state. By the same Act it is provided, as already mentioned, that the nationality of a wife shall be the same as that of her husband. An Englishwoman, therefore, who marries a French citizen ceases to owe allegiance to the Crown of England. Lastly, those persons who on their birth obtain a double nationality, are enabled by this statute to make a declaration of alienage, by which they reject the one and retain the other.

Local nationality. We have seen that the law of Rome recognized two distinct forms of citizenship, namely, imperial and local—the universal citizenship of Rome, and the particular citizenship of those territorial divisions of the empire which continued to be called *civitates* in memory of their origin as independent states.

[1] Forsyth's Cases and Opinions on Constitutional Law, p. 334.
[2] *Doe d. Thomas* v. *Acklam*, 26 R. R. 544.
[3] *Isaacson* v. *Durant*, 17 Q. B. D. 54.
[4] *Doe d. Auchmuty* v. *Mulcaster*, 29 R. R. 390.

We have seen that after Caracalla the *civitas Romana* became almost universal, that Rome became *communis patria*, but that every man retained none the less a particular or local citizenship in the *patria* of his birth. We find nothing similar to this in English law. The British empire, like the Roman, is a congeries of different countries, the populations of which live under different laws; but, unlike the case of Rome, there is but one citizenship throughout the length and breadth of the dominions of the Crown. No man is a subject of England, or of Scotland, or of Victoria, or of Quebec. He is a subject of the British empire in its unity, or else he is an alien. No one has by our law any *patria* or fatherland, save the territories of the Crown in all their world-wide compass. Even when England and Scotland were as yet united in a merely personal union, in the century that elapsed between the accession of James I and the Act of Union, there was no distinction between Scottish and English citizenship. He who was a subject of the king in Scotland, was his subject in England also. There was but one king, and therefore but one allegiance[1].

The law might well have been settled otherwise. For the purposes of private international law especially, it might have been wise to follow Roman doctrine in this matter, and to recognize local side by side with imperial citizenship. Every British subject might have been not merely a citizen of the empire as a whole, but a citizen, at the same time, of one of the great territorial divisions of which the empire is composed. But it is not so. The difficulties involved in the exclusive recognition by English law of a single citizenship throughout an empire made up of many different countries having separate laws, legislatures, and governments, have led to a very singular result. A man may be a British subject in one part of the empire, and an alien in another part. In New Zealand he may be an Englishman, and in England a Frenchman. In Victoria he may owe permanent allegiance to the British Crown, and on crossing the border into New South Wales he may find himself an alien. The cause of this remarkable state of the law is that, although the naturalization of aliens is within the power of colonial legislatures, the effect of their legislation is limited to their own territories[2]. Therefore a Frenchman naturalized in South Australia remains an alien in all other parts of the empire. His acquired citizenship is British and imperial in name; it is South Australian and local in reality. The legal recognition of local citizenship would have avoided so unreasonable a result. Imperial citizenship would have

[1] *Calvin's* Case, or the Case of the *Postnati*, 2 State Trials, 559.
[2] Naturalization Act, 1870, § 16.

remained, as in Rome, exclusively within the gift and jurisdiction of the imperial Parliament, while local citizenship would have been a privilege to be granted or withheld at the will of local legislatures.

The rights of a British subject. We have considered the essential meaning of British nationality, and the methods of its acquisition and loss. It remains to consider its consequences. In what respects, then, do the legal rights and liabilities of a subject differ from those of an alien? In Rome, as we have seen, the essential distinction lay in the possession of different systems of personal law. But no such conception was known to feudalism, or plays any part in the modern law of nationality and allegiance. A Frenchman does not bring with him into England his own law, or any part of it. So soon as he comes within English dominions he submits himself to the burden, and becomes entitled to the benefit, of the law of England. Whether subjects or aliens, all men in England live by the same law. Yet this law does not necessarily give equal rights to both classes, or impose equal obligations upon them. To this day, though in much smaller measure than formerly, it confers privileges upon subjects, which it withholds from aliens, and imposes upon subjects liabilities from which aliens are free. These special rights of subjects are such as are deemed rightly to flow from the fact of permanent allegiance due to the English Crown. These special burdens, on the other hand, are those from which aliens are held exempt by reason of the permanent allegiance which they owe to a foreign government. Let us consider such of them as are of chief importance.

Subjects alone possess political rights. No alien can acquire any measure of political power, or take any part in the government of the realm. In English as in Roman law, citizenship is the sole title to the *suffragium et honores*. For in Rome it was only by that *jus quiritium* from which aliens were excluded, that such rights were given, and in England no man will be admitted to serve the king who does not acknowledge him as his liege lord, and has not been received into his allegiance.

In respect of civil as opposed to political rights, aliens are at the present day in almost all points on an equality with subjects. The uniform tendency of legal development is to abolish all difference between them. Yet there are a few special privileges to which subjects only are entitled. No alien has any legal remedy in respect of an act of state. He will not be heard in an English court of law to complain of the acts of the English Government. Whatsoever grievance he has, he must take with him to his own state, where, peradventure, by way of diplomatic action between the two governments, he may obtain redress. He has the protec-

tion of the law of England against all private persons who do him injury, but between him and the servants of the Crown the laws are silent. A British subject, on the other hand, whether in the realm or out of it, has the same defence against acts of state as against those of private persons. The servants of the Crown will answer to him for all injuries suffered at their hands, and will not be heard to allege the command of the Crown or the exigencies of public policy, for with respect to the subjects of the Crown 'the common law does not understand that sort of reasoning[1].'

No alien can own a British ship or any share of one[2]. Public policy demands that the British mercantile marine shall remain in the exclusive possession of British subjects. Nor can any alien take advantage of any statute which is expressly or by implication limited to British subjects. For the legislature has thought fit upon occasion to confine the benefits, just as it has often confined the burdens, of its enactments to those who owe permanent allegiance to the Crown[3].

By the common law, now altered by the Naturalization Act, 1870, no alien could hold or inherit land in England, nor could any one inherit such land through an alien. This rule is one of great antiquity, and can be traced back into the thirteenth century, but it seems clear that at a still earlier period no such disability of aliens was recognized by our law. It is not involved in the primitive conception of allegiance, for there is nothing in feudal theory to prevent a man from holding land of two lords, or therefore in two kingdoms. French law, in other respects much harder upon aliens than our own, seems to have put no bar in the way of their ownership of land[4]. It has been suggested with much plausibility[5] that the English rule has its source in the perennial state of war existing in name or in reality between France and England after the loss of the Norman possessions of the English king. Frenchmen are not merely aliens, they are alien enemies, therefore their lands will be seized into the king's hands, and their inheritances disallowed, until such time as there is peace again between the realms. But peace is long in coming, and the rule becomes in the meantime hardened and generalized into a perpetual and universal disability

[1] *Entick* v. *Carrington*, 19 State Trials, at p. 1074; *Buron* v. *Denman*, 2 Ex. 167; *Musgrove* v. *Chun Teeong Toy* [1891] A. C. 272. *Quaere* to what extent, if at all, a *resident* alien is, or ought to be, entitled to protection against acts of state. See Pollock on Torts, p. 108 n., 6th ed.

[2] Naturalization Act, 1870, § 14; Merchant Shipping Act, 1894, § 1.

[3] See, for example, the Wills Act, 1861, providing for the execution of wills out of the realm by British subjects. See also *Adam* v. *British and Foreign Steamship Co.* [1898] 2 Q. B. 430, on the construction of Lord Campbell's Act.

[4] An account of the disabilities of aliens by the law of France before the Revolution will be found in Pothier's Traité des Personnes et des Choses.

[5] Pollock and Maitland's History of English Law, i. 444.

imposed upon all aliens, whether Frenchmen or Spaniards, friends or foes.

The liabilities of British subjects. In some points the position of aliens, instead of being inferior to that of subjects, is superior to it. The reason is that aliens, even though resident within the territory, are partially exempt from the local jurisdiction. In most respects, indeed, the German who comes to England, subjects himself to English law, and submits to the jurisdiction of the English courts and legislature. Yet his submission is not so full and absolute as that of the natural subject. It is qualified by the allegiance which he still owes to his own sovereign. The extent of the jurisdiction which may be exercised by one state over the subjects of another is primarily a matter of international, rather than of civil, law. Civil law, however, follows international, and endeavours to conform to it. Both courts and legislatures seek to restrain their jurisdiction over aliens within the limits allowed by the law of nations. It is a recognized principle of English law that all statutes must be so construed, if possible, as not to overpass these limits. 'Statutes,' it has been said, 'must be understood in general to apply to those only who owe obedience to the laws, and whose interest it is the duty of the legislature to protect. Natural born subjects and persons domiciled or resident within the kingdom owe obedience to the laws of the kingdom, and are within the benefits conferred by the legislature; but no duty can be imposed upon aliens resident abroad, and with them the legislature of this country has no concern, either to protect their interests or to control their rights [1].'

Therefore, although a British subject will answer in England for treason committed, whether in the realm or out of it, and whether in war or peace, an alien is liable only for what he does within the realm itself, for it is only there that he owes any allegiance to the Crown. And even for acts done by him in British territory he is no traitor, if he come openly with force of arms and in the way of lawful war. For an open enemy, who is an alien, is not within the protection, nor therefore within the allegiance of the Crown, notwithstanding his presence in the realm. 'If an alien enemy,' says Coke, 'come to invade this realm, and be taken in war, he cannot be indicted of treason; for the indictment cannot conclude *contra ligeantiae suae debitum*, for he never was in the protection of the king, nor ever owed any manner of ligeance unto him, but malice and enmity [2].'

So where the legislature sees fit to extend the jurisdiction of

[1] *Jefferys* v. *Boosey*, 4 H. L. C. 815. [2] Case of the *Postnati*, 2 State Trials, 617.

the criminal law to offences committed out of the realm, it is careful to limit the liability thus created to the acts of British subjects. A British subject may by statute be tried in England for murder, bigamy, and certain other crimes committed beyond the seas, but speaking generally no alien coming into this realm can be punished for any act done by him elsewhere[1].

Alien enemies. We have seen how Roman law distinguished between alien friends and alien enemies. The former are those between whose state and the state of Rome there is a league of friendship, peace, or alliance (*foedus amicitiae*). By them, though aliens, law and justice are to be had in Rome. All others are alien enemies, between whom and the Romans there is no law save the law of war, and no right save that of the sword. A like distinction is to be found in English law, though in modern times its rigour is much abated. 'Alien enemies,' says Blackstone, 'have no rights, no privileges, unless by the king's special favour, during the time of war[2].' Their property may be confiscated by the Crown, and their persons seized as prisoners of war. They can maintain no action in any court of law. They can acquire no rights by any manner of contract or dealing with the subjects of the Crown, for all such contracts are void, and any subject, trading with an enemy without the special licence of the Crown, is guilty of an offence which renders all his property engaged in such illegal trading liable to capture and forfeiture. But when peace has come again, and the alien enemy is become once more an alien friend, he is remitted to his former standing before the law, and may bring his action even for a cause of action which accrued before the war. For his rights are merely suspended, not destroyed, save so far as the Crown has, during the war, actually exercised its powers of confiscation.

Who, then, shall be deemed alien enemies within the meaning of this rule? Let us hear Sir Edward Coke on the matter. His doctrine is curiously Roman, and differs in important respects from that which is received at the present day. In his view it is not a mere state of peace *de facto* that makes an alien friend; there is required in England, as in Rome, a *foedus amicitiae*. 'Leagues between our sovereign and others,' he says, 'are the only means to make aliens friends[3].' But all the kings and princes of Christendom are in his time in league with the king of England. Therefore save in actual war their subjects are alien friends in

[1] *Reg.* v. *Keyn*, 2 Ex. Div. 63; *Att.-Gen. of N. S. W.* v. *McLeod* [1891] A. C. 455. Even the jurisdiction of the civil courts is in some cases thus limited by considerations of foreign nationality. *Ex parte Blain*, 12 Ch. D. 522.

[2] Commentaries, i. 372.

[3] Case of the *Postnati*, 2 State Trials, 653.

England. With pagans and unbelievers, on the other hand, a Christian will have no treaty of friendship. They are perpetual enemies, for whom there is no law in England. 'A perpetual enemy,' he tells us, 'though there be no wars by fire and sword between them, cannot maintain any action, or get anything within this realm. All infidels are in law *perpetui inimici*, perpetual enemies, for the law presumes not that they will be converted, that being *remota potentia*, a remote possibility, for between them, as with the devils whose subjects they be, and the Christian, there is perpetual hostility and can be no peace [1].' It is scarcely needful to state that no such law as this is recognized at the present day [2]. League or no league, in Christendom or in heathendom, it is actual war that makes an alien enemy, and actual peace that makes an alien friend. We no longer accept the Roman doctrine that all are enemies who are not friends; all, on the contrary, are friends who are not enemies.

But there is another and more important respect in which the law has developed since the days of Coke. Paradoxical as it may seem, it is well settled that the character of alien enemy no longer depends on nationality or allegiance. When England is at war with France, a Frenchman may be an alien friend, and an Englishman an alien enemy. The determining factor is no longer nationality but domicile. The alien enemy is he who voluntarily adheres to the enemy by living and trading in his country. Whether he belongs by allegiance to the enemy state, or to a neutral state, or to England herself, is a question completely irrelevant. He is accounted an enemy because he adds by his presence and his property to the resources of the enemy state. Therefore, though he be himself an Englishman, his ships and cargoes will be good prize of war for English cruisers, his contracts with Englishmen will be illegal and void, and his suits will not be heard in English courts. Hence it is that an incorporated company, though it owes no allegiance and has no nationality, may none the less be an alien enemy, and subject to all the disabilities of such. Conversely a man may owe allegiance to the enemy state, yet if he withdraws himself from its territories, and takes up his domicile in any neutral state or in England with the leave and licence of the Crown, he will be deemed no enemy of England, but an alien friend, entitled to all the rights and remedies of such, and his allegiance will not be remembered against him.

JOHN W. SALMOND.

[1] Case of the *Postnati*, 2 State Trials, 638.

[2] [In point of fact, both Elizabeth and James I exchanged compliments with the Sultan.—ED.]

THE STORY OF THE *HABEAS CORPUS*.

IT may sound a little surprising to assert, at the present day, that there is no readily accessible book, nor, indeed, so far as the writer is aware, any book, which gives, in a succinct and intelligible form, an account of the origin of this famous bulwark of our liberties. And yet there have been times in our history, and may be again, when 'those famous words *Habeas Corpus*' have been on the lips of every one who takes an interest in public affairs. Most of us know that the famous Habeas Corpus Act of 1679 created no new remedy, but merely strengthened and perfected an engine which had been used with effect in the great struggle between Crown and Parliament in the earlier years of the century. The older statutes, the Petition of Right and the 16 Car. I. c. 10, which mark the stages of that Titanic struggle, also refer to the writ of *Habeas Corpus* as a thing well known. As we follow back the story, we find the same assumption everywhere. The writ is accepted as a primordial fact. A few vague flourishes about ancient liberties are supposed to account for its existence. It would almost seem as though it were indiscreet to inquire too closely into the origin of this sacred instrument. And the writer believes that there was once a time at which such inquiry would indeed have been indiscreet—that those who then knew most and felt most strongly about the writ of *Habeas Corpus* had the best of reasons for discouraging antiquarian research. It is not likely that Coke and Selden and Prynne were really ignorant on the subject. But they often speak as though they were [1].

In truth there is not a little about the *Habeas Corpus* which requires explanation. In the first place it seems odd (or it would seem odd in any system of law but our own) that the king's writ, this 'high prerogative writ,' as Blackstone calls it [2], should have been the great engine for defeating the king's own orders. In the second place, it is somewhat disconcerting to find that this high preroga-

[1] The only serious attempt at history known to the writer is that of Mr. A. A. Fry, who was counsel for the Canadian prisoners in 1838, and who published a pamphlet on the subject. This pamphlet was afterwards made the basis of an essay by a learned Dutchman, Dr. Van der Veen (De Engelsche Habeas Corpus Act. Leiden. 1878). But Mr. Fry gives up the inquiry at the very point at which it becomes interesting, adding some rather unkind suggestions about antiquarians and their amusements (p. 9, n.).

[2] Commentaries, iii. 131. This has become the orthodox phrase.

tive document is not an Original writ at all, but a mere interlocutory mandate, or judicial precept, which occurs in the course of other proceedings. Thirdly, and this perhaps is the most embarrassing discovery, the more one studies the ancient writs of *Habeas Corpus* (for there were many varieties of the article) the more clear grows the conviction, that, whatever may have been its ultimate use, the writ *Habeas Corpus* was originally intended not to get people out of prison, *but to put them in it.* These are facts which should surely arouse a just curiosity. Amongst other thoughts which they suggest, they seem to raise this not unimportant historical question—Were the champions of popular liberties, in those stormy days of the early seventeenth century, quite so conservative as they professed to be? When they were loudly asserting that they did but vindicate the existing order, were they in very truth effecting a revolution?

Now the great matter of the liberty of the subject did not rest on mere tradition in the days of Coke. Whatever may be the true meaning of that famous passage in Glanvil[1], which Coke so triumphantly quoted[2], whatever the precise value of that still better known and vaguely rhetorical clause of the Great Charter[3], neither of these vague authorities could stand before the precise and elaborate provisions of the great Statute of Westminster I[4], which, in its fifteenth chapter, had disposed exhaustively of the subject of bail. That chapter was in full force when Coke prepared his Second Institute. He wrote an elaborate criticism upon it. The chapter is too long to quote in full; but amongst those persons who are in the plainest language declared not to be 'replevisable,' are 'those which were taken . . . by commandment of the king or of his Justices.' Coke employs the whole force of his argument to show that the words 'by commandment of the king' do not mean what they obviously do mean, even descending so low as to assert, that 'the commandment of the king' means the order of the King's Bench, while 'of his Justices' means the Common Pleas[5]. But the whole of Coke's commentary on the statute is an audacious piece of political controversy, thinly disguised under cover of legal exegesis. It is kindest to remember, that the Second Institute was not published until some time after its author's death.

Plainly, then, the asserters of public liberties found a lion in the

[1] 'In all pleas of felony the accused is wont to be let out on bail, except in plea of homicide' (xiv. 1). I doubt very much whether this includes the person indicted at the suit of the king. We must remember that the indictment was a novelty when Glanvil wrote. The corresponding passage in Bracton (fo. 123) clearly refers only to *Appeals.*

[2] 2 Inst. 42. [3] Cap. 39. [4] 3 Edw. I. c. 15.

[5] 2 Inst. 186.

path. They could not use any of the ordinary remedies against unlawful imprisonment. This will be clear if we look for a moment at these remedies.

1. The writ *de Homine Replegiando.* This was the most obvious proceeding. It lay equally against the sheriff, i. e. the royal agent, and the private person [1]. If the latter did not give up his prisoner, but sought to escape obedience by *eloigning* his captive—i. e. hiding him in a distant county—he could himself be summarily imprisoned by a *Capias in withernam* [2]. Both sheriff and private person were liable to attachment if they disobeyed the writ. But when we read the writ, in any of those books of precedents which so rapidly appeared after the introduction of printing [3], we see in a moment why it was that the heroes of the seventeenth-century struggle could not venture to rely on it. Assuredly no Chancellor of James or Charles would have hesitated to affix the broad seal to the document. For it bade the sheriff replevy the prisoner NISI CAPTUS FUERIT PER SPECIALE PRECEPTUM NOSTRUM.

2. The writ *de Manucaptione.* This was a writ framed, apparently, on the latter part of the fifteenth chapter of Westminster I. According to its form, as given in the orthodox books [4], it was only available for persons indicted of larceny before sheriffs by inquest of office; and as, by a statute of the year 1354 [5], sheriffs were forbidden to take indictments, the writ seems to have fallen into disuse. In any case, it expressly referred to the Statute of Westminster I, and could, therefore, hardly have been used by any one claiming to be set at liberty in defiance of the provisions of that statute. Moreover, a statute of the year 1331 [6] had reissued the statutory restrictions on mainprize. The difference between bail and mainprize is explained by Coke [7], but does not seem to be material for our purpose.

3. The writ *de Odio et Atia.* This writ, which is fully described by Bracton [8], only lay in favour of a man imprisoned on an *Appeal* of homicide, i. e. at the suit of a private person. It directed the sheriff to hold an inquest whether the accused was accused on good grounds, or of 'hatred and malice.' It is said to have been

[1] See the form in F. N. B. 66 F.
[2] Ibid. 68 C.
[3] For convenience a few of these may be named: Natura Brevium (Pynson), about 1510; Liber Intrationum (Pynson), 1510; Novae Narrationes (Pynson), about 1516; Registrum Omnium Brevium (Rastell), 1531; Novel Natura Brevium (Fitzherbert), 1534; Natura Brevium (Rastell), 1534; Retorna Brevium, 1541 (but previously); Natura Brevium, newly and most trewly corrected (Redman), about 1543; Intrationum Liber (Henry Smythe), 1546; Registrum Omnium Brevium (Yetsweirt), 1595; Booke of Entries (Coke), 1614; Book of Entries (Moyle), 1658; Thesaurus Brevium, 1661; Brevia Judicialia (Brownlow), 1662; Officina Brevium, 1679.
[4] E. g. Registrum (Rastell), 83; F. N. B. 249 G.
[5] 28 Edw. III. c. 9.
[6] 4 Edw. III. c. 2.
[7] Little Treatise of Bail and Mainprize, cap. 3.
[8] Fo. 123 a.

the writ alluded to in the twenty-sixth chapter of the Great Charter, and it probably represents a very ancient right of a party challenged to battle[1]. In its form of an inquest, it was, no doubt, a powerful agent in the gradual evolution of the criminal jury. Coke, who had his own reasons for magnifying the writ (which had probably fallen out of use long before his time), invents a statute of 28 Edw. III to abolish it, and then revives it by implication in the 42 Edw. III. c. 1[2]. The real truth of the matter is, in all probability, that, with the dying out of Appeals of homicide, the writ ceased to be applicable, and fell into oblivion[3]. In spite of the vague wording of the Statute of Westminster II[4], it can hardly be believed that it could have issued in favour of a prisoner at the king's suit. In any case it would not, even if successful, have resulted in a *Habeas Corpus*, but in a writ *de ponendo in ballium*, of which the form is given by Bracton[5].

Thus we have seen, that the three most obvious remedies for wrongful imprisonment were practically closed to the victims of Charles I. But their champions were mighty in the law, and knew all the mazes of the jungle. If they could not lead their prisoners out by the highway, they would drag them through secret windings to a place of safety.

We know that the instrument which they chose for their purpose was the writ of *Habeas Corpus*. But when we look for the writ of *Habeas Corpus* in the contemporary records, we are at first puzzled by the choice offered to us. To say nothing of the *Habeas Corpus* (or, rather, *Habeas Corpora*) directed to the sheriff, bidding him bring up the four knights for the Grand Assize[6], or the jurors in an ordinary inquest[7], we find that, under the more familiar name of *Capias*, the writ of *Habeas Corpus* plays a normal part in almost every personal action. The first step after the service of the writ is the summons, and the second is the *Capias ad respondendum*, which bade the sheriff *have the body* of the defendant on a given day before the Court[8]. As the sheriff might have some difficulty in

[1] See Pollock and Maitland (2nd ed.), ii. p. 588 n.

[2] 2 Inst. 43. The extreme unfairness of Coke's argument on the Statute of Westminster I is apparent from the writ *de bono et malo*, which he quotes in another part of his book. This writ apparently allowed a prisoner to be delivered from gaol if he were willing to put himself upon a jury. But it contained the express words *et non per aliquod speciale mandatum nostrum* (2 Inst. 43). One would like to know more of this writ; but it seems to have disappeared before the Register got into print.

[3] It may be noted that in his Treatise on Bail and Mainprize (cap. 10), Coke had already given a different account of the disappearance of the writ *de odio et atia*.

[4] 13 Edw. I. c. 29 'appealed or indicted.'

[5] Fo. 123 a. The writ *de cautione admittenda*, also alluded to by counsel for the prisoners in the *Five Knights' Case*, seems to have been applicable only to secure the release of a person who had been taken on an *excommunicato capiendo*, and who was willing to purge himself of his contumacy (F. N. B. 63 C).

[6] Registrum (Rastell), ii. 23. [7] Ibid. 29. [8] Ibid. 1.

executing this order, he was warned a second and a third time before being attached for disobedience. These warnings went by the names of *alias* and *pluries* respectively; and these names will awaken certain memories. If the *Capias ad respondendum* proved ineffectual to secure the defendant's appearance, the plaintiff might resort, at first only in trespass *contra pacem*, but afterwards in almost all other actions [1], to the elaborate process of outlawry. And when the necessary forms had been gone through, and the sheriff had returned *quinto exactus*, the plaintiff could then get a *Capias utlagatum*, which would direct the sheriff to seize the outlaw, and have him before the Justices at Westminster on a given date, *ad faciendum et recipiendum quod Curia nostra de eo consideraverit* [2]. If, when the sheriff had got the defendant in prison, he failed to produce him at the proper time, alleging that the prisoner could not be moved for danger to his health, he might be reminded of his duty by a subsequent writ of *Habeas Corpus super Languidus retorn'* [3]. If, the accused was in custody on an Appeal of homicide, the sheriff might be directed to *have his body* before the Justices on a certain day, that they might proceed with the Appeal [4]. A similar writ lay to apprehend a man who had been indicted of felony, but had eluded arrest under outlawry [5]. Finally, if judgment were given against the defendant, the sheriff might be ordered by the writ of *Ca. Sa.* to *have the body* of the defendant before Our Justices, *ad satisfaciendum* the claim of the plaintiff [6].

These writs have been mentioned, not because it is contended that any one of them is in itself the famous weapon of political warfare, but that we may be warned to look for the origin of that weapon, not in vague assertions of the liberty of the subject, but in what seems to be, at first sight, a wholly unlikely quarter, viz. that practice of arrest on mesne process, which was so long one of the great scandals of our legal procedure. As Pollock and Maitland have pointed out [7], the *Habeas Corpus*, in its form of a *Capias*, or arrest on mesne process, was making its way into English law before the close of the thirteenth century. And

[1] 13 Edw. I. c. 11 (Account); 25 Edw. III. st. v. c. 17 (Debt, Detinue, and Replevin); 19 Hen. VII. c. 9 (Case).

[2] Registrum, 24. The absurdities to which this clumsy form of procedure gave rise are well illustrated by the fact that, in the reign of Elizabeth, an outlawed defendant claimed to be discharged on the ground of a general pardon (Coke, Entries, 345, *Pews of Penrhyn's Case*). At one time he could always get out of prison by suing a *supersedeas* before he was finally exacted, or a pardon afterwards. These abuses were put an end to by statute (5 Edw. III. c. 12).

[3] If there was the slightest suspicion of the sheriff's good faith, there might be added to this writ a *subpoena duces tecum* (Officina, 65), or a fine might be imposed on the sheriff at once (Registrum, ii. 76).

[4] Registrum, ii. 74.

[5] 25 Edw. III. st. v. c. 14.

[6] Registrum, ii. 31.

[7] History (2nd ed.), ii. 593.

although, in the dearth of law books which followed the work of Bracton and his epitomists, exact proof is not forthcoming, we may regard it as fairly certain, that the writs we have enumerated were fully established as ordinary legal process before the end of the fourteenth century. The *Capias ad respondendum*, the *Capias utlagatum*, and the *Capias ad satisfaciendum* are practically as old as the common law itself.

But, if we look at the Statutes and Year Books of the fifteenth century, we shall, I think, gain the impression that another and very important form of the *Habeas Corpus* is making its way into legal procedure. This is the *Habeas Corpus cum Causa* (or, more briefly, *Corpus cum causa*), which bids the sheriff, or other custodian, '*have the body* of A in our prison under your custody as it is said' before Our Justices at Westminster on a certain day, 'together with the day and cause of his caption and detention, to do and receive what Our Court shall consider of him on this part.' It is a little significant that this writ is, apparently, with the striking exception to be hereafter referred to, not to be found in the early printed books of forms. The next example I have met with is in Coke's Entries, published in 1614[1]. But it is quite clear, that the writ of *Corpus cum causa* was known, in one form or another, at least two hundred years before that date. What were the occasions on which it was used?

In the present state of the authorities, any statement about the law of the fifteenth century must be made with extreme caution. But as the result of a fairly earnest attack on Statutes and Year Books, I venture to put it, that the *Corpus cum causa* was used, for a long time, as a mere adjunct to two important writs Original, the writ of *Certiorari* and the writ of *Privilege*. A word on each of these.

1. *Certiorari*. This was, as is well known, a prerogative writ, by which the King's Bench removed the proceedings from an inferior tribunal to its own *forum*. It appears that, as the law stands at the present day[2], the writ always issues as of right at the request of the Crown, but, at the request of the defendant or prisoner, only on cause shown. It seems, however, that, at the very beginning of the fifteenth century, the writ was employed as a means of chicane by both prosecutors and defendants. A statute of the year 1414[3] is directed against the practice by condemned prisoners of procuring the writ, and getting released on bail; and it is probable

[1] Fo. 344. It should be noticed that Coke's form does not always include the *et detentionis*.

[2] Hawkins, P. C. ii. 27, § 27; *R.* v. *Eaton* (1787) 2 T. R. 89; C. O. R. 1886, R. 29.

[3] 2 Hen. V. st. i. c. 2. 'Writs of *certiorari* and *corpus cum causa*.'

that the same practice is alluded to by another statute passed twenty years later[1]. Much about the same time, the writ was used as a means of evading liabilities on Statute Staple. When arrested on the summary process provided by the Statutes of the Staple, debtors obtained a *Corpus cum causa* from Chancery, on the pretence of having a legitimate defence; and then, having procured bail, proceeded to issue a *Sci. Fa.* to test the validity of the recognizance[2]. The *Certiorari* was also used by prosecutors as a means of oppression, with the object of snatching outlawries without giving the accused time to appear[3]. Somewhat later, the same writ, with its accompanying *Habeas Corpus*, was used by defendants to delay proceedings in local courts, an abuse which was checked by two statutes of Elizabeth and James I[4]. The principle of the *Certiorari* is indeed very old in our law; for it is, in essence, little more than a development of the ancient *Pone*[5]. And it is worth noting, that, in the very earliest known Register of Writs, it is expressly said, that a *Pone* will only be granted TO THE TENANT, *aliqua ratione precisa vel de majori gratia*[6].

Although cases of *Certiorari* do not become frequent in the Year Books until the latter half of the reign of Henry VI, we may probably take it, that from the beginning of the fifteenth century the remedy was recognized, and that it was enforced by a *Corpus cum causa*. The connexion between the two writs comes up in a curious quarter, viz. Cowell's Interpreter, where the *Habeas Corpus* is treated merely as an incident in *Certiorari*[7]. Cowell is certainly not above suspicion in the matter; but neither, for the matter of that, is Coke. Each must be taken for what he is worth. But the value of the *Certiorari* for Coke's purpose was certainly discounted by the drawbacks:—(1) that it could only be applied for when proceedings had already been commenced in an inferior tribunal, (2) that the writ could not be claimed as of right by a prisoner or defendant.

2. *Privilege.* From very early times exemption, absolute or qualified, from legal process, was freely claimed by divers classes of persons. The most conspicuous example is, of course, that of the clergy; but other people were not slow to follow their example.

[1] 15 Hen. VI. c. 4. See also 6 Hen. VIII. c. 6, and 1 Ph. & M. c. 13, § 7.

[2] 11 Hen. VI. c. 10. 'Divers writs of *corpus cum causa* before the king in his Chancery.' It is possible that the origin of the Chancery jurisdiction in this procedure is the statute of 1414 (2 Hen. V. c. 9). But, of course, recognizances were specially the concern of the Chancellor.

[3] 10 Hen. VI. c. 6.

[4] 43 Eliz. c. 5; 21 Jac. I. c. 23.

[5] Glanvil, vi. 7.

[6] Maitland, Harvard Law Review, iii. 113.

[7] Ed. of 1607, sub tit. *Habeas Corpus.* The writ referred to by Cowell in the Register Judicial (fo. 81) is not, however, the *Corpus cum causa.* See also under that title in Cowell.

As early as the reign of Henry IV [1] a clerk of the Chancery who was sued in the Common Bench obtained a *Supersedeas* on the ground that he could only be sued in the tribunal of which he was an official. The Common Law Courts claimed similar privileges on behalf of their officials [2]; and the privilege of members of Parliament rested on similar grounds.

Towards the middle of the fifteenth century, we notice a vigorous development of the theory of *Privilege*. Where a man is sued in a superior court, and, on coming to appear, is arrested on a process in an inferior tribunal, he is entitled to a *Corpus cum causa*, directed to the officers who have arrested him; and they will be ordered to produce him before the higher court [3].

Needless to say, this chance of escape from liability was soon abused; and we find the Courts busily engaged, during the greater part of Henry VI's reign, in deciding when *Privilege* might be allowed, and when not. Thus, it was early decided [4], that the application would only be granted where the applicant had been arrested *veniendo morando vel redeundo*, on the business of his case. What the superior tribunal would do with the applicant when he came before it is not quite clear; sometimes he was only allowed to appoint an attorney, sometimes, apparently, he was bailed. But it was always agreed that a *Supersedeas* [5], and, *à fortiori*, a *Corpus cum causa* [6], did not lie for a person imprisoned at the suit of the king, even where the king's interest in the suit was purely formal, e. g. in an action of trespass *contra pacem*. In another case [7], where the proceedings in the superior tribunal were obviously feigned, the Court refused the *Corpus cum causa*, on the ground that the applicant could not have been coming to attend to his duties in the superior court *in vacation*. A further rule laid down was, that if the proceedings in the superior court were commenced after the imprisonment, there was no case for the *Habeas Corpus* [8]. In later cases the Court dealt sharply with persons who sought to abuse the process [9]. If the memory of this class of cases had not entirely died out, we should hardly have found judges in the eighteenth century alleging that the *Habeas Corpus* did not apply in civil suits; nor should we have required a special statute to get over the difficulty.

The position at the end of the fifteenth century seems then to be

[1] Y. B. 14 Hen. IV (Hill.), pl. 72.
[2] See the writ in Liber Intrationum, fo. 11.
[3] Y. B. 4 Hen. VI (Mich.), pl. 22; 9 Hen. VI (Mich.), pl. 40, *Lucy Water's Case.*
[4] Y. B. 9 Hen. VI (Pasch.), pl. 16.
[5] Y. B. 9 Hen. VI (Mich.), pl. 24.
[6] Y. B. 22 Hen. VI (Hill.), pl. 34, *Danby's and Baker's Case.*
[7] Y. B. 39 Hen. VI (Hill.), pl. 15; affirmed, 2 Hen. VII (Mich.), pl. 6.
[8] Y. B. 8 Edw. IV (Mich.), pl. 23.
[9] Y. B. 16 Edw. IV (Mich.), pl. 5; *Worlay* v. *Harrison* (Dyer, 249 b).

tolerably clear. The remedy of *Corpus cum causa* is available to an imprisoned applicant; but only on one of two grounds. He must show either (1) that there is a proceeding in which the King's Bench or the Chancery would be justified in issuing the prerogative writ of *Certiorari* or its equivalent, or (2) that he, the applicant, enjoys a special privilege which entitles him to exemption from proceedings in all but a particular tribunal [1].

In the sixteenth century, however, the *Corpus cum causa* expands beyond these limits. We note a disposition to use it to test the validity of an imprisonment [2].

In one of the very earliest of the printed Form Books [3] there appears a writ addressed to the Constable of the Tower, directing him, under penalty of £100, to *have the body* of a certain John Elyngton *together with the day and cause of his caption and detention*, before our Justices at Westminster, to answer to a plea brought against him for the sum of forty shillings by one Wilfred Armidel, *et ad faciendum ulterius et recipiendum quod curia nostra*, &c. The prisoner had been arrested in the suit at the Common Bench, and let out on bail. Then he had been arrested by the Constable of the Tower, who had refused to produce him on the first demand. Unhappily, there seems to be little clue to the date of the writ. It must, of course, have been before 1510, the date of Pynson's book; but beyond that fact there is nothing to guide us [4]. The language of the writ, however, the flourishes about the sworn duty of the king to render justice to all his subjects, and the suspiciously small amount of the claim in the Common Bench [5], point irresistibly to the conclusion, that we are here on the track of a struggle between the law courts and the executive, in which recourse is being had to the lately established theory of privilege for suitors, in order to test the validity of a State imprisonment. If so, the writ is a landmark

[1] The *Supersedeas* as a writ of Privilege, with date 39 Edw. III, is given in the Registrum (Rastell), fo. 91. The Common Law Courts did not, apparently, issue a writ of Privilege; but, upon presentation of a Bill of Privilege by the applicant, awarded at once the *Corpus cum causa* to the gaoler.

[2] One very interesting writ in Brownlow (p. 115) bids the sheriffs (*vobis* .·. presumably, of London) *nolentes ipsum W. vinclum imprisonamenti tamdiu subire*, 'to have the body of the said W. on Friday, the 3rd August next, before W. P. one of the Justices of Our Bench at the mansion house of the said Justice at Strond (? Stroud) Bridge to do and receive.' If the W. P. referred to is William Peryam, the writ must date from the last quarter of the sixteenth century. But if it be William Paston, whose ancestors were settled at Horton, near Stroud (Glouc.), long before they colonized Norfolk, then the writ is 150 years older. But these are guesses.

[3] Liber Intrationum (Pynson), fo. 25.

[4] I cannot find any trace in the histories of any John Elyngton. He may have been the John Alyngton of whom we read in the Paston Letters (ed. Gairdner, i. 277) as having been one of the informers against the notorious rioter, Robert Ledham, in 1453. But this is mere conjecture.

[5] Obviously, the amount was only just enough to give the Bench jurisdiction (6 Edw. I. c. 8, Stat. Glouc. c. 8).

in our story. A Year Book case of 1497 [1], in which a lady obtained a *Corpus cum causa* to test the validity of a recaption of herself (after an escape) by a gaoler of a franchise, is also interesting, for it raises a question of which much was heard in later days. The gaoler sought to evade the point at issue by omitting the cause of detainer in his return. It was held that, where the arrest was made *ex officio curiae*, it was not necessary to specify the cause; otherwise where the arrest was at the suit of the party. Two writs in Rastell's Register [2] (both, alas, undated) are directed to securing the appearance of a defendant who has been arrested by the malice of the plaintiff, but the words *cum causa* are not found.

In the year 1588, two cases of a distinctly political character were decided on *Habeas Corpus*. In the first (*Search's Case*) [3] the applicant had been arrested by the Steward of the Marshalsey, for himself causing the arrest (presumably by due course of law) of one Mabbe, who had obtained Letters of Protection from the Queen. The Court of Common Pleas discharged Search from custody, and, on his subsequent re-arrest, issued an attachment against Mabbe and his friends.

Howell's Case is still more striking. There the Steward of the Marshalsey returned to a *Habeas Corpus* that the prisoner was committed *per mandatum Francisci Walsingham militis Principalis Secretarii et unius de privato concilio Dominae Reginae*. The return was held to be insufficient, for not stating the cause; and then the Steward amended his return, alleging a committal 'by the opinion and order of the whole Privy Council.' With some reluctance the Court seems to have admitted that such a return was good; but it insisted that the prisoner should always be produced, so that 'if it shall seem good to the Court, the prisoner shall have his privilege [4].

These cases led directly to the famous pronouncement known as *The Resolution in Anderson*. This dictum, one of the very few extra-judicial pronouncements of the English Bench, seems to be entirely unworthy of the contumely which has been heaped upon it. Read carefully, in the light of history, it appears to be a very exact and careful statement of the law, coloured neither by subserviency nor by arrogance. Put in its briefest form, it lays down two propositions:—

A. That persons committed 'by Her Majesty's commandment from her person, or by order from the Council Board, or if any one or two of her Council commit one *for high treason*,' —such persons are not *bailable*; but,

[1] 13 Hen. VII (Mich.), pl. 1. This had been previously admitted (Y. B. 9 Hen. VI (Mich.), pl. 24).
[2] ff. 66, 81. [3] 1 Leon. 70. [4] Ibid. 71.

B. 'Nevertheless the Judges may award the Queen's writs to bring the bodies of such persons before them' (and then remand them) 'which cannot conveniently be done, unless notice of the cause in generality, or else specially, be given to the keeper or gaoler that shall have the custody of such a prisoner[1]' (*anno* 1592).

So far from being an unworthy concession to Court influence, this Resolution marks a distinct advance in the development of the *Habeas Corpus*. It sweeps away the historical accidents of the writ—the accompaniments of *Certiorari* and *Privilege*—and definitely establishes the *Habeas Corpus* as a substantive remedy, which exists as of right for all prisoners. With regard to the vexed question of the 'cause shown,' the judges and barons who unanimously signed the Resolution knew perfectly well that for this further demand there was no legal authority, if the imprisonment was by order of the Crown. But in the most decided, though at the same time courteous, manner, they intimate that the Crown would do well to give way upon the minor point.

From this time the *Habeas Corpus* starts upon a new career of activity. At the very beginning of the seventeenth century it succeeded in procuring the release of Sir Thomas Shirley from the Fleet, whither he had been committed on an arrest for debt[2]. In 1608 the Common Pleas, by its agency, rescued Sir Antony Rooper from the clutches of the Court of High Commission[3]. In 1610 the great case of the validity of the customs of London (*Wagoner's Case*[4]) was decided on a *Habeas Corpus*. In 1615, in the case of Peter Furb, the Court of Common Pleas asserted its ancient privilege of protecting its suitors by the same writ[5].

We are now, perhaps, in a position to understand the merits of the famous *Five Knights' Case* of 1627[6]. Sir Thomas Darnel and four others were committed to the Fleet by a warrant, signed by two members of the Privy Council, which alleged for cause only *per speciale mandatum regis*. Darnel applied to the King's Bench for a *Habeas Corpus*, which was immediately issued. The Warden of the Fleet made some little delay in returning the writ; but, on the receipt of an *alias*, put in a return which merely alleged the warrant as above described. The same course was taken with the other four prisoners. The Court of King's Bench, after hearing

[1] Anderson's Reports, p. 298.

[2] C. J. i. 149. In this case the *Habeas Corpus* was issued by virtue of a warrant of the Speaker directed to the Clerk of the Crown in Chancery. In former days a writ of Privilege would have been necessary.

[3] See the writ in Brownlow, 122. Coke claimed (4 Inst. 333) that a similar victory had been obtained over the same Commission in 1567, in the case of Thomas Lee. But a reference to the writ in this case (Moyle, 61) shows that it issued on the ground of privilege. Lee was an attorney of the Common Pleas.

[4] Rep. 121 b. [5] Moyle, 56. [6] 3 St. Tr. pp. 1-235.

lengthy arguments for the prisoners, remanded the latter to prison. It is difficult to see how, as the law then stood, the Court could have done otherwise. The writ of *Habeas Corpus* had been readily granted; but the return showed a cause for which the prisoners were not 'replevisable.' When the decision of the King's Bench was under discussion in Parliament, in a conference between the two Houses, Coke met the difficulty by a bold argument. Admitting, as he was obliged to do, the plain meaning of the Statute of Westminster I, he urged that it applied only to proceedings by way of replevin in the Sheriff's Court, 'a petty and base Court, and not of record, where the sheriff is not the judge, but the jurors, that is John a Noke and John a Stiles, William Roe and John Doe, and such worthies as these[1].' But Coke must have known perfectly well, that the powers of his former colleagues of the King's Bench, in the matter of bail, belonged to them only as justices of the peace, and not as justices of the bench. The business of the justices of the bench is, not to bail prisoners, but to try them.

Now the powers of justices of the peace to grant bail rested, unfortunately for Coke, upon express statute, and very limited they were. They seem to have been first given by a statute of 1483[2], which allowed justices of the peace to bail persons committed 'on suspicion' or 'on light suspicion, of felony.' Stringent precautions in the exercise of this power were imposed by a slightly later Act[3], while the great criminal statute of the year 1544[4] expressly re-enacted the provisions of the Statute of Westminster I with regard to persons not replevisable, and ordered strict observance of them by all justices of the peace.

In the end Parliament did the only thing possible under the circumstances, by introducing a bill to alter the law. In the year 1628 this bill, now known as the Petition of Right, received the grudging assent of the king; and an obscure sentence in it gave the victory to the Parliament, by abolishing the power of the Crown to imprison without cause shown[5].

The acceptance of the Petition of Right was almost immediately followed by the *Six Members' Case*[6] in 1629. As in the case of the Five Knights, the writ was granted without demur[7]; but, contrary to the precedent of 1627, the prisoners were not produced at the bar of the King's Bench, the different gaolers merely returning that the prisoners were committed by order of twelve of the Privy

[1] 3 St. Tr. p. 127. [2] 1 Ric. III. c. 3. [3] 3 Hen. VII. c. 3.
[4] 1 Ph. & M. c. 13, § 2.
[5] 'And that no freeman in any such manner as is before mencioned [*i. e.* without any cause shewed] be imprisoned or detained.'
[6] 3 St. Tr. (Howell), pp. 235–294.
[7] Hyde, however, threw out a hint that the Court might not be so complaisant on a future occasion (3 St. Tr. p. 289).

Council upon a warrant signed by the king himself[1]. The cause of committal alleged in the latter document was, 'notable contempts by him committed against Ourself and Our government, and for stirring up sedition against Us.' It was strenuously argued, that this was no sufficient cause of committal within the terms of the Petition of Right[2]; and Heath, the Attorney-General, had to resort to the meanest of quibbles, as well as the most dangerous constitutional doctrines, to get over the objection. Nevertheless, as is well known, the Court refused to enlarge the prisoners, though their committal was a clear breach of Parliamentary privilege, unless they would find sureties, not only for their reappearance, but for their good behaviour[3]. This they naturally declined to do, as such a step would have been a virtual admission of guilt[4].

The *Six Members' Case* was followed by eleven of the blackest years in the history of English law, during which the growing indignation of the popular party found, owing to the suspension of Parliament, no adequate means of expressing itself. Whether the Courts during this period refused applications for *Habeas Corpus*, it is difficult to discover without an exhaustive search. But that they did so is highly probable, for one of the earliest acts of the Long Parliament, which met in November, 1640, was to appoint a Committee on the Courts of Justice[5], and, a few days later, to refer to it the question of *Habeas Corpus*[6]. The result of the Committee's action is very clearly shown in the sixth section of the famous Act for the Abolition of the Star Chamber[7], which received the royal assent in July, 1641; but it may be doubted whether the wording of the section, which was evidently the subject of much discussion, was altogether wise. At first the proposal seems to have been, to declare the *Habeas Corpus* claimable as of right by every prisoner, a course which, one would have thought, would have prevented many future disputes. But, after engrossment of the bill, the desire to refer to the hated tribunal by name seems to have got the better of the discretion of the House, and a rider was sewn on to the parchment[8] which, in effect, limited the scope of the provision to commitment by a conciliar Court, or by the king's personal warrant, or that of the Privy Council. Unhappily also, the Act did not touch upon the question of vacation, though it expressly attributed equal functions to the King's Bench and the Common Pleas. As is well known, this omission gave an opening to a serious miscarriage of justice in *Jenks' Case*[9], a proceeding in which the forms

[1] 3 St. Tr. p. 240. And production expressly refused (p. 286).
[2] Littleton's argument (p. 262); Selden's (p. 265).
[3] Ibid. p. 281. [4] Ibid. p. 289.
[5] C. J. ii. 21, Nov. 6. [6] Ibid. 28. [7] 16 Car. I. c. 10.
[8] Statutes (Record Commission), v. 112. [9] 6 St. Tr. 1189–1208, *anno* 1676.

of law were perhaps more shamelessly abused by the judicial bench than in any of the more famous trials in the days of Charles I.

This has not been a very lucid story, but it has been no easy task to pierce the mists with which the barbarous condition of the evidence and the deliberate mis-statements of party controversy have covered the subject. The final word on the history of the *Habeas Corpus* will not be said, until the Year Books have been re-edited, and the long series of judicial rolls (or at least a good selection from them) carefully printed. Meanwhile, however, this paper claims to have suggested the answers to at least four questions which, for the last two hundred years, have puzzled the student who has grappled with the *Habeas Corpus*. As thus:

1. *Q.* Why was there any doubt whether the writ issued 'as of right'?

A. Because the *Certiorari* never issued as of right on the demand of the defendant, and the *Privilege* only issued in certain special cases (ante, pp. 69, 70).

2. *Q.* Why was there any doubt as to the proper tribunal?

A. Because the *Certiorari* only issued by order of the King's Bench, while the *Privilege* (writ or bill) sometimes issued out of the Chancery and sometimes out of the Common Pleas (ante, p. 71).

3. *Q.* Why could the writ only be claimed in term time?

A. Because no one could take proceedings during vacation in a superior Court, and to take proceedings was, *ex hypothesi*, the object of the *Corpus cum causa* (ante, p. 71).

4. *Q.* Why could the gaoler demand an *alias* and a *pluries*?

A. Because, the original *Capias* being an order to *arrest* a person, the sheriff, to whom it was addressed, might reasonably have some difficulty in catching his man (ante, pp. 67, 68).

All of which questions were finally set at rest by the Habeas Corpus Act of 1679[1].

EDWARD JENKS.

[1] 31 Car. II. c. 2.

THE PURPOSE AND METHOD OF A LAW SCHOOL[1].

PART I.

IF a student of law, wearied it may be by the feverish pursuit of latest editions, were to seek diversion in the ample folios of Kennet, he might light upon a certain event which deserves a place in the annals of human justice. 'The King (James II) resolved to have Westminster Hall entirely at his own command, and filled only with those judges who should assert his dispensing power . . . The first man the King attempted to persuade was Sir Thomas Jones, Lord Chief Justice of the Common Pleas, who showed a great averseness, and at last told the King plainly he could not do it. The King answered, he would have twelve judges of his own opinion. To which Sir Thomas replied, that possibly he might find twelve judges of his opinion, but he would scarce find twelve lawyers to be so——!'[2] The retort, familiar to readers of Macaulay, deserves to be recalled. The learned Lord Chief Justice, Sir Thomas Jones, has been generally regarded as a man who was no better than he ought to have been, and indeed, if truth must out, as a man who was in some important respects a great deal worse. Yet he must have had certain ideas about lawyers which deserve examination. He would probably have thought, for example, that to become a lawyer was a high ambition worthy of long years of endeavour. Had it been possible for him to have met Hamlet in the graveyard scene he might have given an unexpected turn to Hamlet's questioning, 'Why may not that be the skull of a lawyer? Where be his quiddities now, his quillets, his cases, his tenures, and his tricks?' Very obviously he would not have contented himself by answering Hamlet after the fashion of the author of The Anatomy of Melancholy, by the downward point of a finger. And so convinced am I of his superior wisdom on this question of a lawyer's calling, that I shall venture to quote his answer to King James II in support of an opinion which I wish to submit for consideration—the opinion that the making of lawyers is a matter of such magnitude and consequence as to merit the undivided attention of a University School.

The connexion between this opinion and the dictum of the judge

[1] Being an Inaugural Lecture delivered in the University of Wales, Oct. 19, 1901.
[2] Kennet's History of England (1706), iii. 451.

may seem forced. It is, however, real. Because a lawyer is a member of a profession, his knowledge has been described as useful, and his education has been looked upon as beneath the dignity of a University School. So-called University law courses, at any rate, often seem designed to suggest a conviction of the inadequacy of a purely legal training, and betray an ambition to fit men to become statesmen, writers of text-books, magistrates, legislators, administrators, and I know not what else. This tendency to depreciate what one might call real law studies—to regard them askance as something hardly worthy of undivided attention—is probably the result of an under-estimation of the qualities which go to make a lawyer, or at any rate of the immense educational value of a legal training. In the East End the other day a child of the State who was asked to choose a calling elected 'to become a duchess and in due time a good woman.' A member of a law school wishes to become a lawyer. Whether he wishes to become in due time something more, directly concerns himself only. He may have high social ambitions. He may have attained to the consciousness of some religious or political ideal. But such possibilities concern himself and not the school. The school has ideals of its own, which will prove on examination to be sufficiently exacting in their call upon the student's time, and sufficiently generous in their expectations of his ability and zeal. Within the limits which those ideals imply, the school may raise high its standards of work and culture. In so doing it will find ample occupation, which will deserve and will demand a whole-hearted devotion. Should the discipline which it affords prove of use or interest to others than those seeking to prepare for the practice of the law, their co-operation should be welcomed. Special provisions might be made for them by a liberal application of the principle of optional subjects. But they must come to the school, and not expect the school to come to them.

What is really implied in that supreme ideal which a law school should strive after? Of what is a lawyer made? The most obvious requirement is a knowledge of the law. This again requires explanation. 'We may know a subject ourselves,' said Dr. Johnson, 'or we may know where to find information upon it.' 'What a man directly knoweth,' said Montaigne, 'that will he dispose without turning to his book or looking to his pattern.' Both these statements have a meaning for the student of law. On the one hand, the lawyer's knowledge of his subject is in part a certain power of being at home in the law—a power to know where and how to seek a rule of law. On the other hand, his knowledge must embrace the principles which legal rules embody. These are

to be found in actual rules, as beauty within a poem. We may read a poem, learn it by heart, scan it, analyse it, parse every word of it, and yet know nothing of its beauty. Legal principle is not less elusive, and for the student not less the thing of supreme import and value. 'While rules, lying isolated in the mind, are continually forgotten,' writes Herbert Spencer, 'the principles which those rules express piecemeal become, when once realized by the understanding, enduring possessions. While the rule-taught youth is at sea when beyond his rules, the youth instructed in principles solves a new case as readily as an old one[1].' 'The finest advocate,' said Lord, then Sir Horace, Davey, in speaking before the Gresham University Commission, 'will state the general principles which he conceives to be applicable to the case he has presented to the court, and he will show how those general principles apply to the case in hand, or if there is a conflict of principle, which is usually the case, he will show how that conflict ought to be decided, and he will illustrate his argument by reference to decided cases. The other mode of arguing, which I think of inferior character, although I agree myself that all of us are guilty of it, is saying, "This case more or less resembles the case of *A* v. *B*, which was decided a year ago," or of endeavouring to show the distinction between the case of *C* v. *D* and the case that is being argued. That is the characteristic of English lawyers, with all their merits, and I think it shows the hand to mouth kind of manner in which they pick up their law by the way. Notwithstanding the great knowledge, the great ability, and the great grasp of legal principles which many of them possess, the majority of English lawyers show, I think, the way in which their law has been learnt, and the want of some such learning as that which I desire to see afforded.'

But in addition to the quality of being so far at home in his subject as to know where and how to seek for information, and in addition to a sound grasp of legal principles, the lawyer must possess a copious and detailed knowledge of such special branches of the law as are likely to prove useful in his ordinary practice. Regarded from this point of view, the interpretation of the expression *a knowledge of the law* may serve to throw light upon the distinction between the lawyer and the empiric. The mind of the empiric may be richly stored with legal rules. The lawyer, while he strives towards such a possession, knowing full well its value, has a mind which is conscious of the presence of the principle within the rule. The empiric walks on the earth. The lawyer knows

[1] On Education.

how to do this, but he also knows how to soar to higher regions, where the wide sweep of his observation may correct the impressions of a more limited vision. Enabled to see things in a truer perspective, he can develop with sounder wisdom the consequences which are involved in particular rules, and can detect the true relation of such rules towards others which are more general. To him belongs the knowledge which throws light into dark places.

But, after all, a knowledge of the law is but the beginning of the lawyer. To the mind well stored we must add the mind well disciplined. Knowledge is to be acquired, not for its own sake, but for the power which it gives. And it can give no power to a mind incapable of its use. Some one has said that in ninety-nine cases out of a hundred which come into a lawyer's hands, matters of fact are more important than matters of law. We might add that in *all* cases which come into a lawyer's hands, knowledge of the law is but an instrument with which the mind of the lawyer works. Thinking is above learning. As Newman so well said, a man of well improved faculties has the command of another's knowledge, whilst a man without them has not the command of his own. Now the lawyer is essentially a man of action. He does not give information to students in a class-room. He is a man of business. He advises clients. He pleads before judges. Hence, with him, the phrase 'capacity to use knowledge' implies a special capacity as well as a special knowledge. What is this special capacity? Sir Henry Maine praised the French lawyers of the eighteenth century for their judicial tact, their ease of expression, and their fine sense of analogy and harmony. Clearly, such qualities are not far from the kingdom. For practical purposes, however, the mental characteristics in the pursuit of which the student of law should be ever ready to give of his best, will admit of more definite expression. The first of these characteristics is that most uncommon quality, so easy to appreciate yet so difficult to define, common sense. I use the term to express that spirit of practical-mindedness which saves a man from the tyranny of prejudice or of theory. Prejudices he may have, but they do not control him. Theories he may have, but they are his own and for himself, not he for them. After the saving quality of common sense I should place such possessions as a ready and retentive memory; a capacity for close, accurate, and sustained thinking; a judgment which sees into the heart of things; a resourcefulness quick to see and to appreciate main issues, and strong in the power, half imaginative, which enables a man to make others see the truth as it appears to him; and, crowning all, the quality of

mind, moral rather than intellectual, which leads a man on towards the ideal of justice. The exact proportion in which such qualities are demanded must depend upon the branch of the profession which a man adopts and the special kind of work which he undertakes. Moreover, all men do not reach eminence by the same path, and the lawyer may compensate for defect of one quality by the strength of another. But the highest achievements demand an all-round efficiency of talent, such as can come to some men never, and to no man without long years of striving and the power which comes of a high and unconquerable purpose.

The object of the study of the law is to help students to become lawyers, and this involves knowing something of the rules of law, a clear grasp of legal principles, and a mental constitution of which common sense, judgment, and resourcefulness are leading qualities. These matters have been dwelt upon at some length, less with the expectation of conveying new ideas than with the purpose of stating certain general facts which go to the root of the matter, cannot be too often recalled, and prepare the way for conclusions of a less obvious nature. Of these conclusions, the first relates to the study of the English Law Reports. I am strongly of the belief that the attention which these reports receive at the hands of the vast majority of law students is fatally inadequate. As the subject of law may be unfamiliar to some of you, I shall say a word in explanation of this conclusion before I attempt its justification. English law has never been expressed in the form of a code. The lawyer in search of guidance consults the text-books of learned authors, or the reports of judicial decisions. Upon what have these decisions been based? Have judges acted as interpreters or as creators of law? 'What thou wouldst not to thyself, do not to thy neighbour. This is the whole law; all else is interpretation,' said Hillel. Some such general principle might be supposed to have legal force in England and to underlie all English decisions. Law courts, at any rate, have assumed that their decisions merely illustrate previous law. In point of fact, however, while judges have often merely decided whether a given state of facts came within the scope of an established rule, they have often gone much further. Rule has been posterior, not anterior, to fact. Actual rules of law, legal conceptions, and legal principles have been reached through a long series of decisions slowly working towards conclusions which were at first felt dimly or not at all. The process may be compared to imperial expansion. The step already taken has compelled other steps in the same direction, further and further beyond the limits originally contemplated. If I might be allowed to employ the language of metaphor, I should say that the English Courts have

endured the birth pangs of many a juristic rule, and, where they have not veiled their incontinency by some theory of royal or supernatural conception, have adopted the device of denying their parenthood. I might add that many evidences go to suggest an increasing, rather than a declining, potency on the part of that discreet beau—the judicial sense of the fitness of things. But, however this may be, we at length possess a legal system so vast, so rich in extent, and so copious in detail, that no man can know it. Lawyers, however, have been enabled to arrive at a tolerably clear idea of the law on more important matters, thanks in part to the efforts of learned authors who have either compiled elaborate digests of cases, or else, more ambitious, have expressed leading principles and more important rules, with illustrations and comment in ordinary text-book form.

The question which I raised just now, and to which I return, relates to the precise use which the student should make of the reports of adjudicated cases, and of the text-books which attempt to state their purport. I hold strongly to the opinion that the text-books are adapted to meet the needs of the young practitioner rather than of the young student. They aim, not at teaching the novice, but at stating the law—two ends, not as distant as God and Mammon, yet so distinct that the failure adequately to distinguish between them constitutes, in my opinion, the capital blunder of modern legal study. In point of fact many of our text-books, in providing a system of rules designed by their fullness to anticipate all contingencies, seem designed to substitute the mnemonic for the higher exercises of thought. Whether or not open to this imputation, their use is to aid, systematize, and complete the student's studies in the Law Reports; never to take the place of those studies. Such, at any rate, is the opinion which I now seek to support by arguments of whose validity I am convinced by the irresistible logic of experience—an experience which began in the classes of Professor Maitland at Cambridge, and was afterwards continued in work with students at other Universities.

Consider for a moment the mental processes included in the study of a decided case. The student begins with a statement of the facts upon the legal import of which the case turns. He first studies the facts in their mutual relations. He proceeds to trace, in the argument of counsel, the application of apparently conflicting principles or cases. He finds in the judgment of the Court a careful examination of opposing views and an authoritative statement of the law. Finally, he examines that statement with the object of giving to it something of a more formal character; for the law is to be found in the decision of the Court, not in the language of the judge. Such

processes, in the case of students of a law school, may be repeated with advantage in class, in the presence of other students, and under the guidance of a lecturer, with whose assistance the students go through every step of the judicial process, and conclude with a discussion of the precise meaning and exact scope of the judgment. By such means the rule of law is impressed upon the memory; the underlying principle is grasped as it can be by no other method, and the mind, disciplined by the experience of high intellectual effort, acquires a new power for future work. I must confess that to my mind the excellence of this method is so obvious as to call for no further justification than a mere statement of its character. Yet it receives so little sanction from the practice of English students that I will venture to draw attention to the arguments which are favourable to its adoption. I shall afterwards consider the value of certain arguments which are in real or apparent opposition.

In the first place, a method of study which proceeds from fact to principle through various stages of discussion and analysis, must serve a certain educational purpose which is likely to appeal to students of every class of subject, and has a special value for the times in which we live. Our receptive faculties grow to-day at the expense of the original or initiative. The very bulk and accessibility of modern literature threaten to become a snare to the unwary student, who is led away from the practice of thinking for himself. To have his thinking done for him by another is so easy and so inviting, and the temptation waylays him at every turn. Indeed, for but one halfpenny a day he may have his political thinking served up in small morsels, and seasoned by details of the latest scandal or crime. As to the world of thought in general, there are books of all kinds and at all prices, wherein he may find his thinking on the subject of life, its origin, meaning, and purpose, served up for his acceptance in forms which are adapted to the requirements of inherited tastes. If he be so disposed, for sixpence a week, he can secure a spiritual pastor, who will save him the discord of conflicting views, and the involved labour of analysis and selection, by a rhetorical reiteration of the commonplace and the uncompromising. Surrounded by these temptations, pressed too by the prospective struggle for livelihood, the student is very apt to yield himself to a soul-destroying despotism. He becomes a mere receptacle for the views of others. Such a fate were a calamity for any student, but must seem peculiarly odious when it befalls one who has undergone the discipline of an Academy. In truth it is relatively unimportant how much a student knows when he leaves his University. It is of incalculable importance that he should have schooled himself in methods of thinking, that

he should have learnt to give a reason for the faith that is in him, that he should have won his way to freedom of thought. It is easy to see how such educational ends are promoted by the study of case law. The student, instead of having his legal principles formulated by proxy, must discover them for himself. He must fight his own way to them by the light of the facts of the case, the argument of the counsel, the language of the judge, and the decision of the Court. At each step in the process the independence of his judgment is exercised. He learns to trust no authority. He acquires, perhaps, that rarest of possessions, a just confidence in his own opinion.

There is another purpose served by the study of case law which must appeal to all true students. Such study offers a school of discipline in the comparative value of arguments. One of the most rare and most useful possessions in life's contest is the power of perceiving the relative value of statements or reasons which may be submitted for our acceptance. I am not now thinking of statements which are worthless or irrelevant, but of such as have a real, though perhaps subordinate, value. An ingenious trifler can find arguments in favour of the wildest proposals. A disciplined mind works upon a mass of such arguments with a wise, if not infallible judgment—weighing, selecting, and arranging, until at length things have appeared in their true proportion. The possession of such a mind is something worth striving for. It gives great power, and deserves unwearying pursuit. How shall it be gained? There is probably no better way possible than the study of case law. The report of a decided case is a discipline in the art of discriminating between arguments of varying degrees of subtlety, relevance, and power. The standard of comparison is not necessarily ethical. The lawyer has less to choose arguments which enjoy a moral superiority than arguments which adapt themselves to the logic of past decisions. But the circumstance does not affect the disciplinary value of the processes which the student is compelled to undergo. In the course of these processes he is building up a mental framework which will be of the utmost value to him in professional practice, and should serve him in the general conduct of life, whatever may be the department in which his activities are employed.

The study of law in the Law Reports promotes certain purposes which must appeal to all who affect a liberal education. It also promotes other purposes which have a more technical significance. It is, for example, the one way by which a student can know the law. The general argument on this head deserves treatment from two points of view. In the first place, the student should work in the Law Reports, because they are the most important of the original sources of the law. The dicta of text-books are sometimes

interpretations of statute, but they are far more frequently the conclusions based on the decisions of the Law Courts. In either case they are but the law at second hand. Now, as the student of history, disdaining to content himself with the opinions of historians, prefers to fight his own way to historical truth through the dry region of document and memoir, so too the student who seeks to gain a real knowledge of the law will refuse a blind reliance upon the dicta of learned authors, and will go straight to the original sources—the statutes of the realm, and the reports of decided cases. No one can enter into the results of others' labours without experiencing something of the difficulties with which others have had to contend. A student cannot start where his teachers have left off. His relation towards the results which others have gained cannot be defined in precise terms, for it varies with the subject, and with individual possibilities and needs. But that relation cannot be one of mere acceptance. And, to be something more than mere acceptance, the student must have laboured along those lines which his predecessors have followed. When he has done so, he will be in a position to profit by their researches. We have heard of hereditary Christians. There can be no hereditary lawyer. If such a thing were even approximately possible, case law might well be less profitable than, to take an extreme case, those examination digests which so often arouse false hopes in the mind of the novice. The point is one on which I can speak with feeling. I recall how, in days not so long ago, and when under the inspiration of a prospective examination, I gained disenchantment in the school of experience. Chancing to enter a book shop in Fleet Street, I came across several volumes which professed to give, in a marvellously modest compass, an account of the several departments of law in the study of which I was then engaged. I purchased the whole collection, and returned to my rooms in triumph. A first glance confirmed my anticipations of good fortune. I began even to entertain a severe opinion of tutors, whose ignorance or prejudice had kept me from entering upon so royal a road to the knowledge of the law. I lost no time in starting to work upon one of the volumes; but before reaching the fifth page my ardour had cooled. Something was wrong. I had read, and had even seemed to understand, but remembered next to nothing. A second effort was so far successful as to ensure the attainment of a memory knowledge. But at the cost of nausea. I felt a machine, not a student. I could repeat the rule and the exceptions, but everything seemed artificial and unreal. Changing the volume, the result was worse. Before the week was over I had learnt the vanity of my hopes. Later experience has deepened the significance of the lesson which I had gained. I had felt that the so-called

'digest,' though of possible service on the day before an examination, was wholly mischievous when made the subject of study. I have since learnt that the treatises of learned authors are hardly less open to the imputation of a dominating purpose which is other than the education of the student. In the case of the 'digest,' that purpose is the passing of an examination. In the case of the treatise, it is the statement of the law. The evil in the latter case is indefinitely less serious, but it is real and palpable. The student is introduced to second-hand statements of law. Actual cases may be quoted, but if so, it is by way of illustration, and to justify conclusions already stated rather than to facilitate the formation of such conclusions by the student himself.

The general argument in favour of the study of case law as a means of gaining a knowledge of the law deserves emphasis from another point of view. A system of study which places the student before the actual facts of decided cases, and calls upon him to assist in the discovery and expression of the rules which they involve, has the merit of placing legal study on the ground which educational theory has approved for other subjects. As early as 1649, Dury, in The Reformed School, protested against beginning with rules and precepts, and argued for a process which should begin with percepts, proceed to concepts, and end with ordered knowledge. In The Conduct of the Understanding, Locke declared that, to have right conceptions, we must bring our understandings to the inflexible natures and unalterable relations of things, and not endeavour to bring things to any preconceived notions of our own. Such views seem to have made little impression upon educational practice until the last century. To-day, however, they begin to bear fruit, and the merits of the inductive method are so far accepted in the world of educational theory as to exercise a very appreciable influence over educational practice. I have already referred to one illustration in the study of history. For the new reliance on original authorities which distinguishes modern historical study, can be regarded as a testimony to the priority of fact to principle in education, as well as to the claim of document and memoir as the founts of historical truth. A second illustration may be found in that growing disposition to postpone grammar to language which distinguishes modern linguistic study. The student of a foreign tongue does not seriously concern himself with the difficulties of accidence and syntax until he has, consciously or unconsciously, made a grammar of his own. Similar tendencies may be traced in most other departments of modern education. They are perhaps little more than a practical expression of the profound aphorism of Vico that truth is only known by us in so far as we ourselves

make it. A legal principle, rule, or distinction—these too are truths, which we can only apprehend in so far as we have fought our way to them. No one else can do that fighting for us. Stimulus and counsel may be given to us by others. The fighting must be our own. 'To give the net product of an inquiry without the inquiry that leads to it,' writes Herbert Spencer, 'is found to be both enervating and inefficient. General truths, to be of due and permanent use, must be earned. . . . The mind should be introduced to principles through the medium of examples, and so should be led from the particular to the general—from the concrete to the abstract. Students should be *told* as little as possible, and induced to *discover* as much as possible[1].'

The study of case law is the one way to know the law. It is also the best way to prepare for the practice of the law. It develops capacity as well as imparts knowledge. There is a special reason for this in the instance of English law. A study of any legal system which is built upon a basis of the facts of human life and experience must favour the development of the practical mind. But English case law means much more than a mere statement of the facts, and of the rule of law which governs them. It means the Law Reports, with the learned arguments of counsel, and the weighed conclusions of the judge. A student may imagine that he studies English case law when he reads some epitome of cases which has been prepared for examination purposes, and states no more than the facts of the case with the decision of the Court. But he is mistaken. He can only study English case law in the Law Reports. When this truth has once been learnt and acted upon, the reward is certain. I doubt if there is a single intellectual faculty of value to the lawyer, which such study does not tend to stimulate and strengthen. It involves the very mental processes which the practice of the profession demands. For the lawyer, in dealing with actual cases, has not at his command a perfect code into the rules of which he can fit any possible combination of circumstances. He must work slowly upward from a basis of fact. This truth, so significant in its bearing upon the question of a lawyer's equipment, was very forcibly expressed in the invaluable report on legal education which was submitted to the annual meeting of the American Bar Association in 1892. 'While law was considered to be essentially a system of rules of action prescribed by a superior, the student's first introduction to it was necessarily to learn by whom and how those rules were presented, in how many forms they appeared, and how they were to be interpreted so

[1] Education, chap. ii.

as to fit the actions of men. . . . But when the student went into the office, instead of having a system of formulated rules which had only to be interpreted to fit the facts of the client's case, he was compelled to work painfully and almost blindly over those facts before he could get them into shape to suggest any rule whatever, and then to search through a wilderness of other cases reported in the books before he could formulate such a rule for his client as he could propound to the Court. . . . Instead of applying a known rule, presented beforehand, he has to reduce the facts to the form of some recognized right among the endless variety presented by the books, and to show its violation and the damage thus done to his client. . . . Then, and only then, he may begin to consider the exact rule by which the issue between them may be solved in his favour, and show its consistency with principle and other rules already formulated in the same way and reported.'

The merits of case law study are conspicuous and indisputable. It remains for us to speak of demerits. These should be weighed by the judicious student. Where their reality cannot be disproved, means should be devised for lessening their importance. The chief objections which ingenuity can urge, seem to fall under one or other of two heads. They either relate to the difficulty of the subject, or to an alleged unsatisfactoriness of the results in consideration of the labour which the student is compelled to bestow. With respect to the difficulty of the subject, it may be urged with great plausibility that a student cannot read a case with profit unless he knows what was the starting point from which the judge set out. Young students cannot place themselves in the position of experienced judges. They are perhaps ignorant of the very meanings of words and phrases, or of the existence of those principles of interpretation, which such reports assume as a basis for argument. They are certain to feel perplexed and confused by the multiplicity of references to cases which have already been decided. For a student to willingly face such difficulties may be courageous, but is it wise? Is it not rather to invite the demoralization which waits upon repeated failure? Before we answer this question, it may be well for us to glance at the other class of objections which may be urged against the study of case law—objections which regard, not so much the difficulties which lie in the student's path, as an alleged insufficiency of results for the labour which he bestows. Obviously, too much time may be spent in tracing the slow evolution of legal principles through the mazes of the Reports. A system which encourages a novice to handle facts before he has mastered principles may easily end in a knowledge which is unsystematic, and very wasteful of his time and labour. Moreover, the law cases

deal with doubtful parts of the law, and often with parts of minutest detail. They assume, rather than establish, those settled principles upon which so much of the lawyer's reasoning depends.

All these objections are plausible. Many of them are much more. They are a natural consequence of the circumstance that English trials have not been conducted with a view to the education of students. But the real importance of the objections can be easily met in practice by the adoption of judicious methods. No well advised novice would seek to emulate the man whom Mr. Bryce describes as 'rolling himself about in a mass of cases in the hope that some may stick to him.' This were folly without method. For the study of case law to be rational, it should be supplemented by three aids which, while they enhance its positive advantages, have the further merit of meeting the difficulties and objections which experience can suggest. The first of these aids is a preliminary acquaintance with the elements of the law—such an acquaintance as may be gained by the study of a brief and simple outline of an actual system of law. The student will not wholly understand what he reads, but he will learn enough to simplify his work in following the arguments and judgments of the Law Reports. The second aid to the study of case law is the assistance of lecturers and of fellow students. The majority of the cases which the student reads should be selected for him by a lecturer who is desirous of smoothing over unnecessary difficulties, of illustrating fundamental principles rather than legal minutiae, and of leading him on to the formulation of a knowledge at once practical and systematic. The historical antecedents and special difficulties of more important cases should be made the subject of discussion in the class-room.

In a later part of this lecture I shall have occasion to refer to the aids which I have just mentioned. There remains an aid which requires immediate and careful attention on account of its liability to abuse. I mean the law text-books. In my enumeration of objections to the case system, I spoke of the possibility of spending too much time in wandering through the mazes of the Law Reports. Notwithstanding the superior discipline and the deeper knowledge of legal principle which are the great educational merits of the case system, that system is less adapted to give fullness of information upon the variety of subjects which come within the scope of a lawyer's work than a text-book which has been written for the purpose of presenting the law on a given subject in an ordered cosmos, and without much regard to the developmental processes by which the rules of law have been evolved. For this reason, and for several others which may be inferred from what I have already

said, I think the student's work in case law should go hand in hand with the study of the best students' text-book in the particular branch of the law which engages his attention. But the student must use the text-books to supplement and complete his reading of the Law Reports, and not as a substitute for such reading. What proportion of the student's time should be devoted to the Law Reports, and what to the text-books, cannot be laid down in definite rules. It depends upon a variety of special circumstances, such as the exact time at the student's disposal, the ability which he possesses, and the particular branch of the profession in which he hopes for distinction. It is a matter upon which the advice of a lecturer, or of some older student of the law, should be taken, weighed, and acted upon as the student's own judgment may decide. My own opinion, formed with reference to the needs and possibilities of average students, is in favour of a student's spending, *at the very least*, one half of his time in the reading of the Law Reports. Such a division would not always receive its due reward before the tribunal of examiners. But I have no manner of doubt of its reward before that higher tribunal where judges sit, or the still higher tribunal of a man's conscience. The study of case law demands time. But if it be an object of study to attain to real knowledge, and especially if it be an object of study to train the mind in methods of sound thinking, the time will be well spent. Let the student of law learn from the student of science. 'I have been engaged for sixteen years in helping to train engineers,' writes Karl Pearson, 'and those of my pupils who are now coming to the front are those who thought more of proofs than of formulae, and accepted even the specialized branches of their training as a means of developing habits of observation rather than of collecting "useful facts[1]."'

W. JETHRO BROWN.

[1] National Life, from the Standpoint of Science, p. 33.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Seton's Judgments and Orders. Sixth Edition. By CECIL C. M. DALE, W. TINDAL KING, and W. O. GOLDSCHMIDT. London: Stevens & Sons, Lim. 1901. Three Vols. La. 8vo. cccxxvii, xxxiv, xxiii and 3024 pp. (£6 6s.)

Daniell's Chancery Practice. Seventh Edition. By CECIL C. M. DALE, CHARLES W. GREENWOOD, SYDNEY E. WILLIAMS, and FRANCIS A. STRINGER. London: Stevens & Sons, Lim. 1901. Two Vols. La. 8vo. cxiv, viii, and 2284 pp. (£5 5s.)

Daniell's Chancery Forms. Fifth Edition. By CHARLES BURNEY. London: Stevens & Sons, Lim. 1901. One Vol. La. 8vo. xcii and 1432 pp. (£2 10s.)

THE publishers of what are rightly described as 'these valuable standard works' inform the legal profession that the new editions have been passed through the press concurrently, and that an arrangement has been made with the editors to make cross-references in all three works. It seems proper, therefore, that the six volumes, forming together one gigantic work, principally but not entirely on the practice of the Chancery Division of the High Court of Justice, should be the subject of one review. In the first place it seems right to say something of the gentlemen who have so ably performed the task of editing the work. Mr. Dale, Mr. Greenwood and Mr. Williams are Barristers. Mr. Burney, or Master Burney as he is generally called, is a Master of the Supreme Court, attached to the chambers of Mr. Justice Byrne, to whom the new edition of Daniell's Forms is dedicated. Mr. King is one of the Chancery Registrars of the Supreme Court. Mr. Stringer hails from the central office, and Mr. Goldschmidt is a 'budding Registrar,' that is to say, he is in the office of the Chancery Registrars. Mr. Dale, apart from his connexion with Seton, and with Daniell's Practice, has already shown his skill and knowledge as the editor of 'Lewin on Trusts.' Mr. Williams has written books on the 'Law of Account,' the 'Law relating to Legal Representatives,' 'Outlines of Equity,' and also a practice-book on Petitions. Master Burney has for several years been one of the editors of 'The Annual Practice,' besides having edited the fourth edition of Daniell's Forms. Mr. Registrar King has not been in the Chancery Registrars' office for many years without learning all that can be usefully acquired in that learned department. Mr. Stringer is well known as one of the editors of 'The Annual Practice,' and has also written books on 'Oaths and Affirmations' and the 'Practice on the Summons for Directions.'

Mr. Goldschmidt's position in the Registrars' office must have enabled him to acquire a thorough knowledge of the practice to be there learnt. With such a strong editorial staff it is not surprising that Messrs. Stevens and Sons have been able to produce six volumes of Chancery Practice, from the writ of summons or other method of commencement of proceedings to judgment and the enforcement thereof either as regards the person or property, dealt with at full length, illustrated by reliable forms, well arranged, and brought well up to date.

What strikes one most forcibly, on looking through the authoritative statements in these volumes, is the great change that, even since the coming into operation of the Judicature Acts, has taken place in many branches of the practice. When the Acts came into force the substitution of the writ of summons and the unsworn statement of defence for the bill of complaint and answer on oath in reply to written interrogatories were perhaps the most striking features of the many changes in the practice. The writ of summons was easily prepared and issued, and, as it did not show the circumstances in which the cause of action arose or was supposed to arise, it gave the plaintiff a full opportunity, after launching his action, of putting his case in the proper way, while the defendant was given a *locus poenitentiae*—a chance of agreeing with his adversary quickly before the plaintiff's pleader had given an uncomfortable account of his doings and defaults in detail. On the other hand, the defendant was relieved from the unpleasant duty of having to swear up to his own defence at an early stage of the proceedings. Many able practitioners at the Chancery Bar considered that the abolition of the sworn answer *as a defence* was to be deplored. One of them, now on the judicial bench, admitted that he should be much less careful in simply denying statements in his statement of defence than he had hitherto been in framing an answer to the truth of which his lay client would have to pledge his oath. Sooner or later, however, the process of interrogation began, and went on in very much the same way as—or any rate to nearly the same extent that—it had done before the Court of Chancery was merged in the High Court of Justice. The Court of Chancery, although it had many technical rules with reference to interrogatories, was disposed to facilitate discovery, and Order XXXI, r. 1 of the Rules of 1875 gave or preserved to both the plaintiff and the defendant the right at certain stages to interrogate their opponents 'without any order for that purpose.' It was held, in *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644, and other cases that the right to discovery in the High Court was regulated by the rules formerly existing in the Court of Chancery, and that the decisions at common law, when inconsistent, were no longer binding. These cases opened up a wide field of research for practitioners and text-writers as to what could be done in the way of obtaining or refusing discovery in the Court which Dickens had so severely attacked. But it was found that the practice of interrogating on the whole bill was expensive and oppressive, and tended to delay the progress of proceedings. Accordingly the almost universal right to deliver interrogatories was considerably cut down. The 'leave of the Court or a judge' was required as a condition precedent to the delivery of interrogatories, and unless otherwise ordered discovery was only allowed on the terms of paying an adequate sum into court. On the whole these and other changes in the practice as to discovery have worked beneficially, but the requirement as to making deposits has often deterred litigants with small means from making applications for discovery which, if made, would have greatly assisted the

applicants. Until quite recently there was a rule that an affidavit of documents was conclusive against the party seeking the discovery, unless it could be shown, either from the affidavit itself, or from the document therein referred to, or from an admission in the pleading of the party making the affidavit, that other documents existed in his possession or power which were material and relevant to the action. See *Jones* v. *Montevideo Gas Co.* 5 Q. B. D. 556; Dan. Ch. Pr. 7th ed. 1565. The rule of November, 1893, now Order XXXI, r. 19 a (3)—which is duly noted in Dan. Ch. Pr. at pp. 1565, 1568, and in Seton, at p. 78—provides that the Court or a judge may on the application of any party, and whether there is or is not any affidavit of documents, order any other party to state by affidavit whether any one or more *specific* documents, to be specified in the application, is or are or have at any time been in his possession or power, and, if not then in his possession, when he parted with the same, and what has become thereof. Master Burney, at p. 976 of the new edition of Daniell's Forms, gives the form of summons to be used under the rule, with an accurate cross-reference to the new Daniell's Practice. On the other hand, some at any rate of the Chancery judges decline to allow or are chary in allowing interrogatories put with a view of obtaining an admission or a denial on oath of statements in the pleading of the applicant for discovery which have been denied in the pleading of the party whom it is desired to interrogate. Some Rule of Court abolishing or modifying this part of the practice is urgently required.

The most important change in modern Chancery Division is that by which points which are often of great importance are in very many cases allowed to be raised by originating summons, and heard in Chambers. Those who are responsible for the index of the new edition of Daniell's Practice have omitted to give a heading of or principal reference to 'Originating Summons,' but, looking to the heading 'Summons' and the sub-reference 'originating,' we find the pages in which originating summonses are dealt with in that book.

The Court of Chancery had power to entertain in some few cases applications made by summonses which were the initial steps in the proceedings—e. g. in administration proceedings under 15 & 16 Vict. c. 86, or under Sir George Turner's Act.

In *In re Busfield*, 32 Ch. D. 123, 125, the late Lord Justice, then Mr. Justice Chitty, said: 'An originating summons first arose under 15 & 16 Vict. c. 86, s. 45, and was confined to the simple case of an order for the administration of the personal estate of a dead man. This provision was left untouched until the Orders of 1883 were issued. An originating summons is now issued under Order LV of the Rules of 1883. This order has greatly enlarged the scope of an originating summons, and made it applicable to new subjects, as, for instance, the execution of trusts. By the Orders of December, 1885, the scope has been still further extended.' Mr. G. N. Marcy, in his useful book on 'Originating Summons,' points out that between the Act 15 & 16 Vict. and 1883 numerous statutes were passed authorizing the decision of questions in a summary way when proceedings were originated by summons, e. g. the Vendor and Purchaser Act, the Conveyancing Act, and the Settled Land Act; and since 1883 the jurisdiction to decide on originating summons has been considerably extended. Every Monday during the sittings—the law reporters' holiday—one half of the Judges of the Chancery sit in chambers, and much of their time there is occupied with originating summonses.

Changes as regards the form of and practice on these summonses have been frequent, a distinct feature being the *ex parte* originating summons which is useful as a means of commencing proceedings under the Companies Act, 1898, s. 15 of the Companies Act, 1900, &c. The two Acts last mentioned are not left unnoticed in the books now under review. As the practice with regard to originating summonses has mainly grown in places where reporters are not generally allowed to take notes, the importance of having officials like Master Burney, Mr. Registrar King, Mr. Stringer and Mr. Goldschmidt on the editorial staff of a great practice work will be appreciated. Another modern change is the summons for directions, the rules as to which were for some time a dead letter. The use of the summons is now compulsory in almost all actions which are not commenced by originating summons.

A change of wide-reaching importance was made by the Companies (Winding-Up) Act 1890, and the Rules and Orders made under it. Prior to the time when that Statute came into operation the winding up of Companies under the Act of 1862 had been for the most part ordered by the judges of the Chancery Division and carried out by them and their chief clerks. As regards proceedings in the chambers of the different judges the practice varied completely. Under a supervision order made by one judge little if anything was done, and the voluntary winding up proceeded practically without supervision. In another chief clerk's chambers the proceedings were almost equivalent to those under a compulsory winding-up order. Moreover the winding-up work, both in court and chambers, was taken on the same days as other business.

When the Act of 1890 came into force the existing judges of the Chancery Division were allowed to retain such part of the winding-up jurisdiction as was left to be exercised by the High Court, but a practice had to be followed which in many respects was taken from the practice in bankruptcy. Official Receivers, committees of inspection, first meetings, and other people and things savouring strongly of bankruptcy appeared on the scene, and the Board of Trade was allowed to have something to say as regarded the liquidation of companies. Bankruptcy had already gone over to the Queen's Bench Division, and in 1893 the winding-up business was transferred to Mr. Justice Vaughan Williams, the bankruptcy judge, who was at the same time made or styled an 'additional Judge of the Chancery Division.' The jurisdiction having been taken from the Chancery judges 'proper,' it became necessary to take the chamber business from their chief clerks, and this was transferred to a newly appointed Registrar with a separate staff constituting the 'Office of the Registrar in Companies' Winding up.' Therefore the winding-up of Companies by the High Court is still in a sense part of the practice of the Chancery Division, although it is under a common law judge, viz. Mr. Justice Wright, the successor to Mr. (now Lord) Justice Vaughan Williams in bankruptcy and winding-up matters.

But the winding up of companies has generally been considered a special branch of practice, and although it is referred to in the volumes under review, the practice with reference to it is not there considered in detail. Indeed the publishers have other important works dealing with winding up at length. Many pages might be filled merely with references to other changes which have taken place since the Chancery Division commenced its work. So far as one can judge by referring to, without reading, the new editions of Seton and Daniell, the changes, whether brought about by statute, rule of Court, or judicial decisions, are adequately

noticed in the six volumes. It remains to add that in the new edition of Seton the valuable notes on the law as to a number of subjects—as distinguished from pure practice—have been continued and brought up to date.

Much also is to be said in praise of the well-known law-publishing company which has shown such intelligence in the selection of its editors, and such enterprise in giving concurrently six great volumes as to practice, well printed and got up in every way, at a moderate price, to the legal profession. F. E.

The Practice of the Privy Council in Judicial Matters. By Frank Safford and George Wheeler. London: Sweet & Maxwell, Lim. 1901. La. 8vo. lviii and 1136 pp. (50*s.*)

This is a very elaborate and complete collection of all the laws and rules by which the practice of the Judicial Committee is governed and brought to bear upon the diverse populations, comprising a fourth of the inhabitants of the globe, who are entitled as subjects, and a still further fraction who by means of treaties with other sovereigns are permitted to appeal to the Sovereign in Council. These laws and rules are enacted by imperial and colonial statutes, orders in council, proclamations, and orders by the committee: never before collected together. The last work on the subject was Macpherson's Practice, published in 1873, in which most of the imperial statutes and orders in council of general application down to that date will be found. The main feature of the present book is that nearly 500 pages are devoted to a complete presentation of all the rules of practice which govern the steps to be taken in an appeal in each one of the various colonies and possessions abroad, and also in the several foreign jurisdictions of the Crown, from the moment that the judgment appealed from is delivered. Of course in many instances the rules are identical. But there are also great diversities, and these are exhaustively noted, with further notes as to the laws in force in the particular locality. One of the authors has been for twenty-five years an officer of the Judicial Committee, with special facilities for acquiring the information here imparted, and the practitioner, we think, may rely on having been supplied with the exact wording of the rules of appeal relating to every portion of the empire, and to every foreign jurisdiction of the Crown. Another 200 pages are devoted to the actual practice before the Council after the appeals have been brought within their cognizance, including that branch of practice peculiar to the Judicial Committee in respect of petitions seeking the exercise of prerogative power in granting special leave to appeal, when the suitor is not legally entitled to do so. These are mostly matters of discretion, dependent on the special circumstances of each particular case; but sixty pages illustrating the mode in which the Committee have for three-quarters of a century dealt with applications of this nature will be found very convenient. The same observation applies to the chapter relating to the extension and issue of letters patent, the rules of practice relating thereto, especially since the Act of 1883, having been carefully digested.

Michael and Will on the Law relating to Gas and Water. Fifth Edition. By JOHN SHIRESS WILL, K.C. London; Butterworth & Co. 1901. La. 8vo. 880, clxviii and lxxxviii pp. (35*s.*)

THIS is, we believe, the only book on the law of gas and water, and it is so well established as the authority on the matters with which it deals, and is in most respects so complete in itself, that it is not likely to have a rival.

The book is more than a mere treatise on the law: it contains also a vast amount of historical and statistical information, and really amounts almost to a gazetteer for the United Kingdom, showing the history and method of gas and water supply in all parts of the country. The first part consists of an introduction with various statistical appendices, and in the second part are set out in full the Gas and Waterworks Clauses Acts, Metropolitan Gas and Water Acts, all the public general Acts relating to gas and water supply, rivers pollution, and kindred subjects, several local Acts and various regulations and reports, model by-laws and model gas and water Bills. These are followed by the numerous Acts conferring on local authorities in England and Wales and Scotland powers as to the supply of gas and water; and lastly are printed the Companies Clauses and Lands Clauses Acts. All these are fully annotated, and it would appear from the indices that reference is made to some 1,500 or 2,000 cases.

There is also a very elaborate, but not perfect, index. It contains some irritating cross-references, such as—'Arrears *see* Receiver,' 'Receiver *see* Arrears'; 'Arrears *see* Judicial Factor,' 'Judicial Factor *see* Debenture Stock'; and 'Coroner *see* Jury,' whereas under 'Jury' there is nothing about coroners. Again, we miss altogether a heading 'Parish Meeting,' though parish meetings are frequently referred to in the text.

Mr. Will has not altogether surmounted the difficulties of the Local Government Act, 1894—that stumbling-block of text-book writers. Thus he still attributes to vestries the powers conferred on them by the Gas and Waterworks Facilities Act, 1870, failing to observe that those powers are now exerciseable by the Parish Council or Parish Meeting (Local Government Act, 1894, ss. 6 (1) (a) and 19 (4)), and in the notes to s. 4 of the same Act he speaks of Urban Sanitary Authorities instead of Urban District Councils.

We fail to see why all the sections of the Lighting and Watching Act, 1833, from 4 to 33 have been omitted. Those sections provide for the adoption of the Act and the appointment of inspectors. It is true, as pointed out, that adoption in rural parishes is now by the Parish Meeting, and therefore perhaps ss. 5–14 are well omitted, but there should be an explanation that the two-thirds majority required by s. 8 is still required for adoption by the Parish Meeting. But in a rural parish which has not a parish council inspectors must be appointed, if the Act is adopted, and therefore ss. 17–32, providing for the constitution of inspectors, are still effective. The author also seems to suggest that the adoption of the Act may be devolved on a committee of the Parish Meeting under s. 19 (3) of the Local Government Act,—a very doubtful proposition.

Except for the few errors which we have detected the book seems to have been well edited, and in all essentials brought thoroughly up to date.

English Law and the Renaissance (the Rede Lecture for 1901), with some Notes. By FREDERIC WILLIAM MAITLAND. Cambridge: University Press. 1901. 12mo. 98 pp. (*2s. 6d.*)

PROFESSOR MAITLAND'S Rede Lecture is exactly what an exoteric lecture addressed by a specialist to a mixed audience ought to be—an interesting discourse with plenty of illustration and anecdote, and not too much pressing of any definite argument. The general thesis, however, is clear enough to students of legal history. The humanist movement of the sixteenth century carried with it a vigorous revival of classical Roman Law; the law of several countries, including Scotland, was thereby Romanized or made more Roman than it was before; there were persons in high places who wanted the same thing to happen in England, and it looked far from impossible. Certainly the power of the Common Law and its courts was at the lowest in Henry VIII's time. The fashion was all for new prerogative jurisdictions and civilian procedure. If any one institution more than another saved us from a 'reception,' it was the Inns of Court with their school of purely English jurisprudence. 'Law schools make tough law.' The notes are full of curious and amusing matters, and almost as good reading as the text.

Law and Practice in relation to Companies under the Companies Clauses Acts, 1845–1889, and under the Companies Acts, 1862 to 1900. By W. D. RAWLINS, K.C., and the Hon. M. M. MACNAGHTEN. London: Butterworth & Co. 1901. Imp. 8vo. lxxxix and 798 pp. (*35s.*)

MR. JUSTICE MAULE begged pathetically for some sort of order—chronological, botanical, metaphysical, geographical, or even alphabetical; he would have begged for it even more pathetically if he had lived to see the state of company law at the present day—that 'ungodly jumble,' to use Cromwell's expression of innumerable Acts, Rules, Regulations, Cases and Forms. In the above book the authors have made a praiseworthy attempt to systematize the law by consolidating the Acts—a thing recommended half a dozen years ago by the Companies Acts Amendment Committee but still unaccomplished. They have also added a large number of useful practical notes on the sections, though the book does not profess to be a digest of case law. It is not only the law of trading companies which is thus treated, but the other great parallel system of company legislation—the law under the Companies Clauses Acts, 1845–1889. The two systems can thus be usefully compared and contrasted without being confused: and to have the whole statute law of both thus brought together in one volume will undoubtedly be a great convenience to many practitioners.

There is a very excellent index and table of cases with references to all the Reports.

The Criminal Code of Canada and the Canada Evidence Act. Second Edition. By JAMES CRANKSHAW, of the Montreal Bar. Montreal: C. Theoret. 1902. 8vo. cvi and 1162 pp.

THE advantages and disadvantages of codification are discussed at length in the introduction to this volume, which contains lengthy extracts from the Report of the Royal Commissioners appointed to consider the provisions of the English Draft Code. The principal objection to the English Draft Code seems to have been that it provided that all offences

should be either prosecuted under the Code or some other statute and not at common law (see section 5); but the Criminal Code of Canada 'does not abrogate the rules of the Common Law which is retained to aid and explain the express provisions of the Code, to supply any possible omissions and to meet any new combination of circumstances which may arise.' The Common Law does not and never has allowed judges to create new offences, it only allows them to declare whether a set of facts which has not previously arisen is or is not within some known principle of the Criminal Law 'which may justly and legally be applied to them' (see opinion of Parke B. cited at p. cv). 'Whatever care be used in defining offences and in the language of the proposed enactments it will be impracticable to make the definitions embrace every possible case that can arise,' says the same learned judge; and the Royal Commissioners themselves admitted that in dealing with the various combinations of circumstances which might constitute a justification or excuse it is not practicable to use language 'at once so precise and clear and comprehensive as to include all cases that ought to be included, and not to include any case that ought to be excluded.' The general opinion will probably be that the Canadian Parliament, when they reduced into a code so large a portion of their Criminal Law, acted wisely in retaining the Common Law 'not only in so far as it affords a defence, but also so far as it may afford a ground of prosecution in cases not otherwise provided for.'

The Criminal Code of Canada is largely founded on the English Draft Code of 1880, and on Stephen's Digest of the Criminal Law of England. Persons in this country will be chiefly interested in comparing the provisions of the Code with the rules of law and procedure at present administered by the English Courts. This is greatly facilitated by the copious notes of Mr. Crankshaw, which seem to contain references to nearly all the principal English cases. At the present time, when the right of a prisoner to give evidence on oath is still in its infancy in this country, it is natural to turn to the Canadian Code to learn what rules have been adopted in the Dominion in respect to this very important matter. We find that every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness. Not only counsel for the prosecution as in this country, but also the judge is forbidden to comment on the failure of the person charged or of the wife or husband of such person to testify, and the cases cited show that this rule has been applied with great strictness. The prisoner need not give his evidence immediately after the close of the case for the prosecution. The rule as to cross-examination is also different: no person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, and if but for the section the witness would have been excused from answering, the answer shall not be receivable in evidence against him in any criminal trial thereafter taking place other than a prosecution for perjury in giving such evidence.

Sections 308 and 310 of the Code are also of special interest at the present moment when the Larceny Act, 1901, has just passed into law, and the complicated provisions of sections 75 and 76 of the Act of 1861 have been swept away. It will be observed that Canada was far ahead of this country in dispensing with the requirements as to a direction in writing, and in applying provisions of this sort to persons other than bankers, merchants, brokers, attornies or other agents.

The Victoria Day Act (1 Ed. VII. c. 12) has also a melancholy interest, and is evidence of the loyalty to Her late Majesty of Her Canadian subjects.

A comparison of section 57 of the Imperial Act 24 & 25 Vict. c. 100 with section 275 of the Code shows that the decision in *Tolson's* case has been incorporated in the text. The imperial statute applies to second marriages by British subjects wherever they take place (*R.* v. *Lord Russell* before the King in Parliament, July, 1901), but the Code provides that 'no person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada unless such person being a British subject resident in Canada leaves Canada with intent to go through such form of marriage.' The reason for this is that Canada being a colony has power to legislate only for offences committed within her own territory (see *MacLeod* v. *A.-G. of New South Wales*, 1891, A. C. 435), and the Supreme Court of Canada (*dissentiente* Sir Henry Strong) has held that sections 275 and 276 are *intra vires* of the Parliament of Canada (*In re* bigamy sections of the Criminal Code, 27 Canada Supreme Court Reports, p. 461).

Among other differences we notice that no presumption shall be made that a married woman committing an offence does so under compulsion because she commits it in the presence of her husband (see section 13). On the other hand, a husband cannot become an accessory after the fact to his wife (see section 63). The provisions of section 314 are wider than those contained in section 91 of the Larceny Act, 1861, which does not meet the case of receiving stolen goods, the original taking of which did not amount to a felony either at common law or under that Act (*R.* v. *Smith*, L. R. 1 C. C. R. 266 and *R.* v. *Streeter*, L. R. 1900, 2 Q. B. 601). In Canada as in England procuring death by false evidence is not homicide, but there is a useful provision in section 146 of the Code which punishes perjury with imprisonment for life, when it is committed in order to procure the conviction of a person charged with any crime punishable by death or imprisonment for life.

It will be seen from sections 743 and 744 that on points of law an equal appeal is given to the Crown and to the accused, who in the event of the judge refusing to state a case may apply to the Court to compel him to do so. This is a decided advance on the English system which in the words of Blackburn J. 'casts upon the presiding judges the very disagreeable and invidious duty of deciding whether their own view of the law at the trial is or is not so questionable as to justify an appeal.' On questions of fact the right to move for a new trial is not given to the Crown, but only to a convicted defendant (section 747).

Taken as a whole the Code which 'was submitted to and carefully considered and revised by legal experts selected from and forming a joint committee of the two Houses of Parliament' appears to us to have successfully accomplished 'the reduction of the existing law to an orderly written system freed from the needless technicalities, obscurities, and other defects which the experience of its administration had disclosed.'

To many English criminal lawyers sections 611 and 612 of the Code, which deal with the form of indictments, will not commend themselves, and they seem since the passing of the Code to have given rise to considerable discussion among the Canadian judges.

Mr. Crankshaw must be congratulated on the successful completion of the present edition. The notes are exhaustive and up to date, the index clear and complete, while the table of cases which extends from page li to page xcii bears eloquent witness to the laborious nature of his task.

A Selection of Cases illustrative of English Criminal Law. By COURTNEY S. KENNY. Cambridge University Press. 1901. 8vo. xx and 544 pp. (12*s.* 6*d.*)

THIS book professes to be one for elementary students, but should prove very useful to all who practise in the Criminal Courts of this country. It contains a large number of carefully selected cases illustrating the main principles of the Criminal Law, and we should think that judges and counsel on circuit, where reports are not readily accessible, would often turn to its pages for a fuller record of a case than is to be found in the ordinary text-books. We gather from the preface that the rather incomplete character of the headnotes is due to the laudable desire to encourage the elementary student to search for the principle in the case itself rather than in the headnote, and that the author desires only to hint at the hidden treasures to be found in the judgments. Where the principle of a case has been subsequently modified by legislation Dr. Kenny draws attention to the fact in a footnote, e. g. the well-known *Carriers* Case decided in the Star Chamber in 1473, which was the ruling case on larceny by a bailee down to the passing of 20 & 21 Vict. c. 24. s. 4, for which is now substituted 24 & 25 Vict. c. 96. s. 3. The anonymous Case cited from the Year Book 21 Hen. VII. f. 31. Mich. pl. 16 should be supplemented by a reference to the provisions of 46 & 47 Vict. c. 38, or the student might reasonably think that an accused person found by the jury to be insane would still be entitled to 'go quit.' The headnote to *R.* v. *Forster* (1 Lewin 187): 'Violent self-defence' is not permitted if retreat is possible, unless retreat would involve letting a prisoner escape, is stated in rather too wide terms, for in that very case Holroyd J. says: 'An officer must not kill for an escape where the party is in custody for a misdemeanour.' From the cases cited under the heading of coverture one would deduce the principle that the husband's mere command to his wife, if he be present, raises a presumption of duress 'except in the gravest crimes.' The better opinion, however, is that this presumption has no application in any case of misdemeanour (see Archbold, 22nd ed. p. 29 and *R.* v. *Cruse*, 2 Mood. 53), and there is ample authority for saying that the presumption does not arise in cases where the offence charged is one connected with the government of the house (*R.* v. *Williams*, 10 Mod. 63). We do not like the expression 'inchoate crimes' under which heading attempts and incitements are dealt with. An act or an omission to act either is or is not a crime. As the law of England says that incitements to commit crime, attempts to commit any crime, and even attempts to incite a person to commit a crime, are all crimes, the word 'inchoate' in connexion with them is misleading.

The book contains many cases which are interesting as showing how things have altered in the course of time. An example of this is to be found in the Year Book 21 Hen. VII. pl. 21, where it is stated that Pigot, an Apprentice-at-law, asked this question of Cutler, a Serjeant: 'If I deliver a silver ring to my servant to keep, and he flees away and takes the ring, will this be felony?' The learned Serjeant replies that it will, and proceeds carefully to explain the reasons for his answer. He must have smiled to himself when the apprentice approvingly replied, 'A right distinction, for in these latter cases the Master has a good right of action against him in detinue or account.' Dr. Kenny's book would be double its present size if at the present day conversations of this sort between leaders and juniors found a place in the authorized law reports.

The book is thoroughly up to date in those matters with which it deals, but would be improved by the addition of three or four cases in which the general principles applicable to indictments are laid down, e. g. *R.* v. *Aspinall* (2 Q. B. D. p. 48).

Principles of the Criminal Law. By SEYMOUR F. HARRIS. Ninth Edition. By C. L. ATTENBOROUGH. London: Stevens & Haynes. 1901. 8vo. xliv and 590 pp. (20*s.*)

THIS book serves a useful purpose in putting those who use it in the way of obtaining fuller information about the criminal law from statutes and cases, as well as from the larger text-books, with which it does not profess to compete. The Larceny Act, 1901, has been dealt with in the text, and the Youthful Offenders Act, 1901, is referred to in the preface. The position of those who compound misdemeanours as opposed to those who compound felonies or informations on penal statutes is not very clearly explained on page 89. From Book III those who are just commencing to practise will be able to get a clear idea of the various stages of a criminal trial which should prove useful to them.

The Poor Law Statutes. By JAMES BROOK LITTLE. London: Shaw & Sons, and Butterworth & Co. Vol. II. 1901. 8vo. xviii and 1624 pp. (3 vols., £4 10*s.*)

A REVIEW of the first volume of this work appeared in the LAW QUARTERLY REVIEW for last July (L. Q. R. xvii. 334), and to the general criticisms therein contained we have nothing to add. They apply with equal force to the volume now before us.

This volume contains the Poor Law Statutes from 1 Vict. c. 22 to 39 & 40 Vict. c. 79—some 150 in all, with notes and indices.

We have again to complain that the author does not fulfil his promise that 'full reference is given to the various series of reports in which such cases are found.' Thus *Pease* v. *Middlesborough Town Clerk* is reported in six series of reports, to only one of which a reference is given.

At p. 663 there is a short note upon apprenticeship to the sea service by guardians. The author does not throw any light upon a question that has been puzzling us. It is enacted by the Merchant Shipping Act, 1894 (s. 106) that, subject to certain special provisions of that Act, apprenticeships to the sea service by a board of guardians 'shall be made in the same manner and be subject to the same laws and regulations as other apprenticeships made by such boards.' Apparently, however, the only Act giving to guardians power to bind poor children apprentices is 7 & 8 Vict. c. 101. s. 12, which further provides that 'nothing herein contained shall directly or indirectly interfere with the provisions of any Act of Parliament relating to apprentices to be bound to the sea service.' And the only regulations affecting apprenticeship by guardians are contained in the General Consolidated Order of 1847, which also does not apply to the apprenticing of poor children to the sea service. Then what is the meaning of the above quoted section of the Merchant Shipping Act? and what are the laws and regulations subject to which boards of guardians may apprentice poor children to the sea service? The Local Government Board decline to elucidate the matter. Perhaps Mr. Brook Little will throw some light on it in his concluding volume.

We have also received :—

Principles of the Law of Contract, with an Appendix containing the Indian Contract Act, &c. By HARA KUMAR MITTER. Calcutta : Harrish Chunder Bose & Co. 1901. 8vo. 116 pp.—This little book is mainly a digest of English leading cases for Indian practitioners or students, and they may well find it useful. The statements are generally accurate, and the following short critical remarks are not intended to detract from this.—*Derry* v. *Peek* and *Pollhill* v. *Walter* have nothing to do with the principles of the law of contract, and should have been, in a concise manual of this kind, omitted or confined to the footnotes.—It is not correct to say generally that if the consideration for a contract be grossly inadequate, a court of equity will interfere. The rule is that gross inadequacy *may be* evidence of fraud.—The subject of Agency is too important to be lumped into a chapter on the legal effects of Contract.—*Synge* v. *Synge* [1894] 1 Q. B. 466 should have been cited on the point of 'anticipatory breach of contract.'—The Indian reader is apparently assumed to be familiar with the Statute of Frauds and with the nature of an action of trover; we do not see why this should be expected of him. —The book has no index, and an appendix which it purports to have is not in the copy sent us.

The Yearly Supreme Court Practice, 1902. By M. MUIR MACKENZIE, S. G. LUSHINGTON and JOHN CHARLES FOX, assisted by A. C. MCBARNET and ARCHIBALD READ. London: Butterworth & Co. 1902. 8vo. cxxxix, 1032 and 142 pp. (20*s.* net.)—This, the fourth issue of The Yearly Practice, appears to have been brought up to date. The Draft Rules for the amalgamation of the taxing departments of the Supreme Court, with a view to uniformity in the Taxation of Costs, are given at p. 627.

Bailments. A Commentary on the Law of Custody and Possession, as distinguished from property in Chattels. By WYATT PAINE. London: Sweet & Maxwell, Lim. 1901. La. 8vo. lxxxvi and 550 pp. (25*s.*)—Review will follow.

The Law of Contracts. By EDWARD AVERY HARRIMAN. Second Edition, revised and enlarged. Boston: Little, Brown & Co. 1901. 8vo. liv and 410 pp.—Review will follow.

A Treatise on the Law relative to Merchant Ships and Seamen. By CHARLES, LORD TENTERDEN. Fourteenth Edition by the late J. P. ASPINALL, Q.C., BUTLER ASPINALL, K.C. and H. STUART MOORE. London: Shaw & Sons; Butterworth & Co. 1901. La. 8vo. cii, 1356 and 88 pp. (£3.)

The Annual Practice, 1902. By THOMAS SNOW, CHARLES BURNEY and FRANCIS A. STRINGER. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 8vo. Vol. I. cclxiv and 1070 pp.; Vol. II. xvi and 678 pp. + index 248 pp. Two volumes in one. (25*s.* net.)

Essai sur le Gouvernement local en Angleterre. Par EDWARD JENKS. Tr. française de J. WILHELM, avec une préface de H. BERTHÉLEMY. Paris: V. Giard and E. Brière. 1902. 8vo. xxvi and 327 pp. (5 fr.)

The Lawyer's Remembrancer and Pocket Book for the year 1902. Compiled by ARTHUR POWELL. London: Butterworth & Co. 12mo. 149 pp. + Diary and pages for the insertion of telephonic numbers (limp leather, 2*s.* 6*d.* net; with pocket book, 5*s.* net).

An Epitome of the Law affecting Marine Insurance. By LAWRENCE DUCKWORTH. London: Effingham Wilson. 1901. 8vo. xi and 173 pp. (3*s.* 6*d.* net.)

The Law relating to Factories and Workshops as amended and consolidated by the Factory and Workshop Act, 1901. By WILLIAM BOWSTEAD. London: Sweet & Maxwell, Lim. Nov. 1901. 8vo. xxvi and 343 pp. (9*s.*)

Statutes of Practical Utility passed in 1901, arranged in Alphabetical order in continuation of 'Chitty's Statutes.' With notes, &c. By J. M. LELY. London: Sweet & Maxwell, Lim.; Stevens & Son, Lim. Nov. 1901. La. 8vo. xxxiv and 176 pp. (7*s.* 6*d.*)

The Principles of Equity, intended for the use of students and of practitioners. By EDMUND H. T. SNELL. Thirteenth Edition. By ARCHIBALD BROWN. London: Stevens & Haynes. 1901. 8vo. liii and 784 pp. (21*s.*)

A general view of the Law of Property. By J. ANDREW STRAHAN, assisted by J. SINCLAIR BAXTER. Third Edition. London: Stevens & Sons, Lim. 1901. 8vo. xxxii, 403 and 24 pp. (12*s.* 6*d.*)

The Law relating to Workmen's Compensation under the Workmen's Compensation Acts, 1897 *and* 1900. By WILLIAM BOWSTEAD. London: Sweet & Maxwell, Lim. 1901. 8vo. xviii and 313 pp. (10*s.*)

The Income Tax Acts, with introduction, notes and cross-references. By H. ST. GEORGE PEACOCK, assisted by ROLLO F. GRAHAM CAMPBELL. London: Sweet & Maxwell, Lim. 1901. La. 8vo. xlviii and 532 pp. (15*s.*)

The Land Transfer Acts of New Zealand, with introduction, notes and forms. By DAVID HUTCHEN and HENRY CECIL WRIGHT. New Plymouth: Thomas Avery. 1901. 8vo. 152 and xv pp. (15*s.*)

The Law of Agency. By ERNEST W. HUFFCUT. Second Edition, revised and enlarged. Boston, Mass.: Little, Brown & Co. 1901. 8vo. li and 406 pp.

Introduction à l'étude du droit constitutionnel. Par A. V. DICEY, K.C. Edition française complétée par l'auteur. Traduction française de ANDRÉ BATUT et GASTON JÈZE. Avec une préface de A. RIBOT. Paris: V. Giard and E. Brière. 1902. La. 8vo. xxxii and 471 pp. (10 fr.)

Roman Law and History in the New Testament. By the Rev. SEPTIMUS BUSS. London: Rivingtons. 1901. 8vo. viii and 480 pp. (6*s.* net.)

Studies in History and Jurisprudence. By JAMES BRYCE, D.C.L. Two volumes. Oxford: at the Clarendon Press. 1901. 8vo. Vol. I, xxii and 553 pp.; Vol. II, xvi and 543 pp.—Review will follow.

The Companies Act, 1900, with Commentaries and Forms. By P. F. SIMONSON. Second Edition. London: Effingham Wilson; Sweet & Maxwell, Lim. 1901. La. 8vo. xliii and 154 pp. (5*s.*)

Ruling Cases. Edited by ROBERT CAMPBELL. With American Notes by LEONARD A. JONES. Vol. XXV. Tenant at sufferance, at will, &c.—Will. London: Stevens & Sons, Lim.; Boston, U.S.A.: Boston Book Co. 1901. La. 8vo. xxxvi and 818 pp. (25*s.* net.)

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.

THE

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NOTES.

JAMES BRADLEY THAYER.

THE University of Harvard and the science of the law have suffered a heavy loss by the premature death of James Bradley Thayer on the 14th of February last. He was born in 1831, and had been a Professor in the Harvard Law School since 1874. His work shows acute perception and patient investigation seldom found together in such well-balanced harmony. The account of the jury system in Prof. Thayer's Preliminary Treatise on Evidence is a model of historical research, and will probably remain the standard authority on that subject for many years. He added the accomplishments of a scholar to the learning of a complete lawyer and profitable teacher of the law. At home he was an excellent companion and a charming host.

The Attorney-General of Manitoba v. *Manitoba License Holders Association* [1902] A. C. 73, 71 L. J. P. C. 28, is a striking example of the importance of the constitutional questions which may be brought before the Privy Council on appeals from the colonies, and especially from the Canadian Dominion. The point calling for decision was whether the Provincial Legislature of Manitoba had exceeded its constitutional powers by passing an Act for the suppression of the liquor traffic in Manitoba, which Act, though dealing only with transactions in Manitoba, did in its practical working interfere with the revenue of the Dominion and, indirectly at least, with business operations outside the province of Manitoba. The Canadian Court of King's Bench held that the Manitoba Act was *ultra vires* and unconstitutional. The Privy Council have reversed the judgment of the King's Bench, and have decided that the Act dealt with a matter of a merely local nature in the Province within the meaning of the British North America Act, 1867, s. 92,

sub-s. 16. The judgment of the Privy Council will approve itself to English lawyers; what however is specially worth notice is the real advantage of obtaining on a constitutional question, which has, we may assume, excited strong feelings in the Canadian Dominion, the judgment of a Court which consists of very eminent lawyers, and is more free on such matters from any suspicion of partisanship than even the Supreme Court of the United States.

Labour leaders, who are inclined to denounce the process of judicial legislation which has created at least two-thirds of what is best in the law of England, would do well to read the decisions of the Court of Appeal on the Workmen's Compensation Act, 1897, which fill the quarter's Law Reports. *Boardman* v. *Scott & Whitworth* [1902] 1 K. B. 43, 71 L. J. K. B. 3, C. A.; *Field* v. *Longden & Sons* [1902] 1 K. B. 47, 71 L. J. K. B. 120, C. A.; *Knight* v. *Cubitt* [1902] 1 K. B. 31; *Ayres* v. *Buckeridge* [1902] 1 K. B. 57, 71 L. J. K. B. 28, C. A.; *Bartlett* v. *Tutton & Sons* [1902] 1 K. B. 72, 71 L. J. K. B. 52, C. A.; *Ellis* v. *Wm. Cory & Son, Lim.* [1902] 1 K. B. 38, 71 L. J. K. B. 72, C. A., and other cases are not exactly lively reading, but they lead to important conclusions which ought to be satisfactory to workmen and to men who profess to be the special friends of the working man.

First. The Courts, it is clear, are determined to give a wide and liberal construction to the Workmen's Compensation Act. In several, if not in all, of the cases enumerated it would have been quite possible for the judges, without any intentional unfairness, to put upon an ill-drawn statute an interpretation which would have deprived workmen of the full benefit of the Act. The Court of Appeal, following in this the lead of the House of Lords, have, to an extent rare with any judges, attempted to carry out the spirit rather than the words of a statute which for the benefit of workmen imposes heavy liabilities on employers.

Secondly. The energy of the Courts in giving full effect to legislation which some, at any rate, of the judges can hardly regard with approval, is, for good or bad, a sign of the tendency towards collectivism which, for the last thirty years, has characterized the current of public opinion in England. The cases go far to prove that the Workmen's Compensation Act, badly drafted as in some respects it is, must be considered in so far a successful piece of legislation in that it attains the end proposed by its authors. It is hardly credible to any one who marks the drift of the cases that a workman who serves a solvent employer should now fail to obtain compensation for damage from accidents incurred in the

course of his service. It is also pretty obvious that employers are having recourse to insurance, and that as time goes on the great body of workmen, using that term in a very wide sense, will in effect be insured against accidents. The number of the cases which come into court need not excite alarm; they must be quite a small fraction of the cases which are settled out of court.

M'Grath v. *Neal & Sons* [1902] 1 K. B. 211, C. A., taken together with cases of a similar character, forcibly suggests the conclusion that the Workmen's Compensation Act, 1897, needs amendment mainly in the way of simplification. Can it, for example, be reasonable that a workman's right to compensation for an accident should depend, as it does in many cases, upon the height of the building on, in or about which he is employed? We may take it for granted that the principle embodied in the Act, though open to some obvious objections, has now become a permanent part of the law of England. If this be granted, it is the interest no less of employers than of employed that the application of the principle should be made as simple and certain as possible.

An action for negligently (not wilfully or corruptly) giving false evidence whereby the plaintiff was wrongly convicted of a criminal offence is certainly a novelty. Such an action came before the C. A. in *Bynoe* v. *Bank of England*, [1902] 1 K. B. 467, 71 L. J. K. B. 208. It seems extremely doubtful whether it would lie even if the conviction had been reversed. Here the conviction was standing, and the Court held, on a line of authorities ending in *Basébé* v. *Matthews*, L. R. 2 C. P. 684, 36 L. J. M. C. 93, that this being so there was no possible cause of action.

Rules of practice, as we have insisted again and again, constantly conceal very curious questions of principle. This is assuredly the case with *Dunlop Pneumatic Tyre Co.* v. *Actien-Gesellschaft für motor, etc.* [1902] 1 K. B. 342, 71 L. J. K. B. 284, C. A. The immediate matter for decision was simply whether a foreign corporation which is temporarily carrying on business in England can be served with a writ under Order IX, r. 8. But the real question raised, or supposed by the Court to be raised, is, what are the circumstances under which a foreign corporation should be deemed to reside in England? And this is a difficult problem of private international law. The decision of the C. A. that under the circumstances of the case the foreign company could be served with a writ appears to be perfectly sound, but on one point of theory which may involve important results in practice, the C. A. would seem to have fallen into

a common error. Their language implies that jurisdiction to serve a writ in England on a foreign corporation depends on the corporation being 'resident' in England. What it does depend upon is not residence but something equivalent to 'presence' in England, it may be for a merely temporary purpose. At common law any man, be he an Englishman or an alien, can be served with a writ in an action if he is in fact present in England, be it only for a moment, and he cannot at common law be served with a writ unless he is present in England, or in technical language, unless he is 'within the jurisdiction'; nothing depends upon 'residence' as contrasted with temporary presence. Of course in the case of a foreign corporation either residence or presence in England is to a certain extent a fiction of law, but there is a considerable practical difference between fictitious presence and fictitious residence. In the one case you have to show that the corporation stands in a position like that of a man who is in England, say for a day; in the other case you have to show that the corporation is in a position like that of a man who is residing in England for a certain time. In the case which suggests this distinction there is no difficulty in seeing that the corporation was through its agents present in England, and therefore could be served with a writ. It is more difficult to maintain that it was residing in England, and however this be, it is presence not residence in England which gives the courts jurisdiction.

The doctrine of constructive notice is one for which equity is often 'defamed by ignorant tongues'; and if the Court of Appeal had acceded to the argument addressed to them by the appellant in *Hunt* v. *Luck* [1902] 1 Ch. 428, 71 L. J. Ch. 239, C. A., it would have given some colour to such complaints. The intending mortgagees in that case were presented with a title derived partly under a conveyance for value and partly under a deed of gift—a title on the face of it quite simple and satisfactory, and none the less so that the property was in the occupation of tenants. The mortgagees took subject to such tenancies, and so far they were fixed with constructive notice of the tenants' rights, but they were entitled to assume—and this is what the decision emphasises—that the payment of rent by the tenants was consistent with the mortgagor's title in the absence of any actual notice that it was not. No doubt if the mortgagees had made inquiry of the local agents to whom the rents were paid they might have struck the track of the alleged fraud in the conveyances to the mortgagor, but also they might not. It is not the policy of the law to cast a burden of this kind on mortgagees or purchasers. It would

hamper free dealing with property and seriously affect the security of the bonâ fide purchaser for value.

A is owner of a building in which there are ancient lights. What is the extent of the light to which he is entitled? To this inquiry two replies have been given.

The first is that *A* is entitled to what may be called a reasonable amount of light, that is to so much as a house of the kind may ordinarily require for purposes of habitation or business. This is the answer, as we understand the matter, in effect given by Mr. Justice Wright (*Warren* v. *Brown* [1900] 2 K.B. 722), and we are far from saying that it was not a proper answer for a court of first instance to give in the conflicting state of the authorities.

The second answer is that *A* is entitled so far to the amount of light which he has actually gained and used at least to this extent, that the ancient lights must not be substantially interfered with so as to make the house less convenient than it was before the interference, having regard to the ordinary uses by way of habitation or business to which it has been put, or may reasonably be expected to be put. This is the answer given by the Court of Appeal (*Warren* v. *Brown* [1902] 1 K.B. 15, 71 L.J.K.B. 12, C.A.), and, subject to the effect of an appeal to the House of Lords, must be taken to be law (compare *Home & Colonial Stores, Lim.* v. *Colls* [1902] 1 Ch. 302, 71 L. J. Ch. 146, C.A.).

The law as now laid down by the C.A. seems to be based on strong grounds of logic and convenience. It is admitted that *A* is entitled to certain lights; it is admitted that *X* lessens the amount of *A*'s light, and thereby takes from him a substantial advantage of pecuniary value. Can it really be an answer on the part of *X* that *A* has as much light left him as most people would need? Is it not again desirable that *A*, who has enjoyed a definite advantage for years, should not be deprived of it simply because *X* finds it convenient to take it from him? It may be suggested that, if this be so, the light to which *A* has obtained a right is the whole of the light he enjoys and nothing less, and it ought not to be interfered with at all. The answer is that substantial damage has always been the gist of an action for nuisance, of which obstruction of ancient lights is a species. An action for nominal damages on this ground (much more an injunction without proof of substantial interference) is unknown to the law. See the admirable judgment of James L.J. in *Salvin* v. *North Brancepeth Coal Co.* (1874) L.R. 9 Ch. 705, 44 L. J. Ch. 149. A few apparent exceptions are explained by the so-called nuisances being really continuing trespasses.

Wise v. *Dunning* [1902] 1 K. B. 167, 71 L. J. K. B. 165, raises, though it hardly decides, two questions of very unequal importance.

First. Can an otherwise perfectly lawful meeting, the members whereof neither commit nor threaten to commit any breach of the peace, become an unlawful assembly on the sole ground that it will provoke other persons to commit a breach of the peace, or, to put the same inquiry in other words, can the lawful action of *A*, *B*, and *C* become unlawful because it provokes *X*, *Y*, and *Z* to do an unlawful act, namely to assault *A*, *B*, and *C*?

To this question the Irish Courts have for many years back returned an affirmative answer, holding, to put a concrete case, that a meeting of Orangemen may be an unlawful assembly if it takes place under such circumstances that it is certain to excite a breach of the peace on the part, say, of a Roman Catholic mob or of Nationalists (see *R.* v. *Justices of Londonderry* (1891) 28 L. R. Ir. 440; *R.* v. *Justices of Cork* (1882) 15 Cox C. C. 78; *O'Kelly* v. *Harvey* (1882) 14 L. R. Ir. 105; but it has hitherto been supposed, mainly on the authority of *Beatty* v. *Gillbanks* (1882) 9 Q. B. D. 308, that the English Courts have answered the same question in the negative, and that the lawful action of *A*, *B*, and *C* cannot be rendered illegal by the unlawful conduct of *X*, *Y*, and *Z*. *Wise* v. *Dunning* however makes it clear that the K. B. D. takes the same view of the common law as the Irish Courts, and that a meeting may become illegal because of the violent and unlawful opposition leading to breaches of the peace which it is likely to excite.

Secondly. Is the judgment of the K. B. D. in *Wise* v. *Dunning* consistent with the judgment of the same Court in *Beatty* v. *Gillbanks*?

This is a curious rather than an important inquiry; no one can in the circumstances object to the judges of the K. B. D. adhering to the doctrine of the Irish Courts and in effect overruling *Beatty* v. *Gillbanks*. Lord Alverstone indeed, whose opinion must carry the greatest weight, holds that there never was any difference between the views of the Irish and the English Courts, and further that *Wise* v. *Dunning* is quite consistent with *Beatty* v. *Gillbanks*. On this point one, if not both, of the other members of the Court would seem to be a little doubtful. A critic who is less anxious than is naturally a judge to maintain the consistency of all the judgments delivered by the Court of which he is a member will, we submit, hold that *Beatty* v. *Gillbanks* has in effect been overruled. Irish judges have assuredly gone very near to questioning the authority of that case (see *O'Kelly* v. *Harvey*, 14 L. R. Ir. 111, judgment of Law Ch.), and to many minds the following words from the judgment of Field J. (*Beatty* v. *Gillbanks*, 9 Q. B. D. 308,

314) seem to imply a view of the law radically opposed to the view suggested in *Wise* v. *Dunning*.

'What has happened here,' he says, 'is that an unlawful organization has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition.'

Surely the simplest way of treating the whole matter is that adopted by Darling J. 'I do not hesitate to say that if there be a conflict between these two cases [viz. *Beatty* v. *Gillbanks* and *R.* v. *Justices of Londonderry*], I prefer the law as it is laid down in *R.* v. *Justices of Londonderry*.'

It is worth remarking that whatever view is taken of the law, *Wise* v. *Dunning* was, on the admitted facts of the case, rightly decided. The appellant had all but admittedly incited his supporters, and by studied insult excited his opponents, to a breach of the peace; he had further been guilty of a distinct breach of a local Act in force in the City of Liverpool by the use of 'threatening, abusive and insulting words and behaviour' in the streets, 'whereby a breach of the peace might be occasioned.' It is impossible to doubt that a Liverpool magistrate had jurisdiction and was indeed bound to bind over Mr. Wise to keep the peace and be of good behaviour, and this was all that the K. B. D. was called upon to decide.

The doctrine, however, laid down or expounded by the K. B. D. may have far-reaching effects. The hands of magistrates who naturally wish to preserve the peace of a town such as Liverpool, Birmingham, or Cork, are strengthened, but, on the other hand, an appreciable check is placed on the freedom of public debate. If *A*, *B*, and *C* cannot lawfully hold a public meeting in certain parts of Liverpool to denounce the Pope because by so doing they provoke Roman Catholics, *X*, *Y*, and *Z*, to break the peace, it would seem to follow that in certain other parts of Liverpool *X*, *Y*, and *Z* cannot hold a public meeting to denounce the errors of Protestantism, since they may thereby excite the Protestants *A*, *B*, and *C* to break the peace. Nor, we confess, do we see clearly how the Salvation Army can in future lawfully meet in towns where they are likely to be opposed by the violence of a Skeleton Army. The peaceable citizen—especially if he has an ear capable of being offended by brass bands out of tune—may perhaps be inclined to say 'Je n'en vois pas la nécessité.' The law would still be less severe than s. 298 of the Indian Penal Code, with which cp. s. 504.

It is not a good plan to execute your will in a grocer's shop. This is the main moral to be drawn from *Brown* v. *Skirrow* [1902] P. 3, 71 L. J. P. 19. Miss Skirrow was apparently one of those people who know a little law. She drew up her own will; she knew apparently that it must be signed by her in the presence of two witnesses present at the same time. She therefore took it to her grocer's, and signed it at one end of the shop in the presence of a shopwoman, who witnessed her signature; she then took it to the shopman at the other end of the shop, who signed the document, but hardly seems to have known what was going forward. All Miss Skirrow's labour was wasted, for Gorell Barnes J. has held, we doubt not rightly, that though both the witnesses were in the same shop at the same time, the will was not signed by the testatrix in the presence of the shopman.

The learned judge's suggestion in *Brown* v. *Skirrow* [1902] P. 3, 71 L. J. P. 19, that all wills should be executed in the presence of some public official, is entitled to great weight. The conditions of the Wills Act as to signature and attestation are precise and not perhaps unreasonably stringent, but, as Aristotle remarked, there are a thousand ways of going wrong and only one of going right, and the chances of going wrong are considerably enhanced by the secrecy with which people who make their own wills surround the formality. It is a funereal affair—the shadow of the approaching end to be hushed up and hurried over. The scene in *Brown* v. *Skirrow* is a dramatic illustration of the haphazard way of doing things. People ought to reflect that the free power of testamentary disposition allowed by the law of England is a privilege in the nature of a trust and carries with it a correlative obligation of care in the exercise of it.

It is not a little singular that at this period in the history of powers it should still be an unsettled point whether the donee of a limited power of appointment exercisable by will only can validly covenant to exercise the power in a particular way in favour of an object of the power. James L. J., when Vice-Chancellor, expressed in *Thacker* v. *Key* (L. R. 8 Eq. 408) an opinion that the donee of such a power, being a fiduciary power, ought to keep himself free to the last moment of his life to deal with the fund as he should think it his duty to deal with it, having regard to the then wants, position, merits, and necessities of the objects. It was only a dictum, but it was a plausible view, and it has been followed by Kekewich J. in *In re Bradshaw, Bradshaw* v. *Bradshaw*

[1902] 1 Ch. 436, 71 L. J. Ch. 230. On the other hand, in *Bulteel* v. *Plummer* (L. R. 6 Ch. 160), where the donee of such a power covenanted to appoint £2500 to a child, an object, and by her will appointed accordingly, Lord Hatherley thought it would be straining the doctrine against improper appointments to hold such an appointment bad, though he refrained from expressing any opinion as to whether the covenant was one on which damages could be recovered. The truth is that so far from being a fraud on the power such a covenant is fulfilling the real purpose of the power which is the benefit of the objects, by eliminating the element of uncertainty and enabling the appointee to settle his or her share on marriage, or come into a family arrangement, as in *In re Bradshaw*. It is on this ground that a covenant to release such a power has been constantly held good, and there seems no solid ground of distinction between a covenant to release and a covenant to exercise in a particular way. Given that such a covenant is free from fraud, and in fact mere machinery for giving the object the benefit of the fund in the best way, why should it not be supported? It has that consideration which consists in confidence reposed.

N assigns to *A* 'so much and such part of my income, salary, and other emoluments from *X* as shall be necessary and requisite for the payment to you of the sum of £22, or of any further or other sums in which I may hereafter become indebted to you.' *A* brings an action against *X* to recover two months' salary due from *X* to *N*, who is indebted to *A* in a larger sum. *A* cannot maintain the action in his own name, since the assignment, not being an assignment of a definite and ascertained amount, does not come within the Judicature Act, 1873, s. 25, sub-s. (6).

This is the effect of *Jones* v. *Humphreys* [1902] 1 K. B. 10, 71 L. J. K. B. 23, and the judgment of the K. B. D. seems reasonable, but a critic of legislation cannot but regret that the whole law as to assignment should not be simplified and summed up in some one enactment.

R. v. *Tibbits* [1902] 1 K. B. 77, 71 L. J. K. B. 4, C. C. R. lays down or re-affirms an important and most salutary rule of law, namely, that any persons who by the publication of unfair statements with regard to legal proceedings attempt to pervert the course of criminal justice are guilty of a grave offence, and if they combine together in its commission are guilty of conspiracy. The circumstances of the case are sufficient to show the necessity of enforcing the rule

which it upholds. *Y* sets up as a so-called criminal investigator, and professes to give proof of the guilt of *N* and *M*, who are on trial. *X*, a newspaper editor, publishes the assertions and comments of this amateur detective, who of course does not hold himself bound by the rules of evidence, which with us are industriously framed for the protection of the innocent at the cost of occasionally allowing the escape of the guilty. *X* and *Y*, in short, do their best to make it impossible for *N* and *M* to obtain just treatment, and then, when *N* and *M* are convicted, argue that the conviction proves that *X* and *Y* were serving the cause of truth, whereas it might equally well prove that *X* and *Y* have succeeded in promoting injustice. *R.* v. *Tibbits* is the condemnation of trial by newspaper.

Gentel v. *Rapps* [1902] 1 K. B. 160, 71 L. J. K. B. 105, teaches us that a tramway company may under the Tramways Act, 1870, s. 46, prohibit under a penalty any swearing (though that was not the branch of the by-law immediately in question) in or upon any carriage belonging to the company. This is a curious sign of the change in moral habits which has taken place since the beginning of the nineteenth century. Few would have been the squires or gentlemen who in 1800 could have travelled in a vehicle where they were debarred from the use of forcible expletives. The case may further remind us of the possible danger of giving to corporate bodies, not all of them as important as that of Bristol, powers of moral control not exercised directly by the national legislature. John Stuart Mill, than whom no man we conjecture was less given to swearing, would have been aghast at the various modes in which corporations of all kinds are now allowed to restrict individual liberty of speech or of action. Profane swearing, however, is theoretically punishable by the general law. There have been modern prosecutions for it in America. Meanwhile we suggest to passengers in Bristol tramcars that *Götterdämmerung* has been found an excellent substitute for swear-words.

There are several interesting articles in the current number of the Journal of the Society of Comparative Legislation. Sir Dennis Fitzpatrick, continuing the subject of non-Christian marriages, considers the Canon Law and other ecclesiastical doctrines. Sir W. Rattigan writes on the legal position of *pardanashín* women (should be *-nishín*, but the Anglo-Indian custom to corrupt this and other Persian words is inveterate, though in this case the corrupt spelling does not even represent any vulgar pronunciation).

Pardanishín women are subject to a rather curious extension of the English equitable rules as to presumption of undue influence. A secluded Indian lady, Mahometan or Hindu, is treated by our Courts something like an expectant heir. She may be illiterate and childishly ignorant of the world. But also she may sometimes be a very shrewd person. There is also a very useful review of the legislation of the British Empire in 1900, and a second article on the history of the Law of Nature by Sir F. Pollock. The only drawback to this excellent journal is that its managers seem unable to secure its appearance with even approximate punctuality. This number, dated December, 1901, was published in February, 1902.

Prof. Goudy writes to us as follows:—

My attention has been called to the fact that in my review of the English translation of Prof. Sohm's Institutes, in L. Q. R. xvii. 426, I have made a mistake regarding a passage in the text, and as it has led me to do a slight injustice to the translator, Mr. Ledlie, I desire, with your permission, to mention it. I remarked in my review that 'at the beginning of § 51 the author says "Jede Formula beginnt mit der Ernennung des judex . . . oder der mehreren judices," which in the translation is rendered "Every formula commences with the appointment of the judge . . . or college of judges" (p. 271). But *mehrere judices* means here simply a plurality of judges. The author is referring to *recuperatores*, and it would be quite inaccurate to speak of the *recuperatores* as constituting a college . . . They were quite unlike the *centumviri*, which body did form a proper college of *judices*.'

The German words above cited, 'Jede Formula' to 'mehreren judices,' were taken by me inadvertently from an early edition of Sohm, and I find that in the later editions the author, in accordance doubtless with the recent habit among German writers of seeking a German equivalent for all foreign technical terms, has altered 'des judex' to 'des Geschworenen,' and 'der mehreren judices' to 'des Geschworenencollegiums.' But he means the same thing.

Mr. Ledlie, accordingly, is perhaps hardly to be blamed for translating 'Geschworenencollegium' as 'college of judges.' But still this also, in my opinion, is an inaccurate translation and gives a wrong impression to an English reader. The reference is to *recuperatores*, and they were private persons ordinarily chosen by lot to try an action, after which trial their functions ceased. They were not unlike an English jury. Such a body cannot properly be described in a legal treatise as a college. Apart from some loose metaphorical meanings, college signifies to an English reader pretty much what *collegium* did to a Roman lawyer (see Sohm, Ledlie's Trans., p. 214): viz. either an incorporation or at least a society having some continuous organization. In German the word *collegium* has a much wider meaning. It is applied to persons united or met together for any specific and temporary purpose, as, for instance, to a jury, a smoking club (Frederick the Great had his Tabaks-Collegium), or a party at whist. I might venture to suggest that 'Geschworenen-

collegium,' in the passage in question, would be best translated simply as 'body (or, collective body) of judges.'

I should like to take this opportunity of saying that although I criticized in the aforesaid review what I regarded as some minor defects in Professor Sohm's treatise, I by no means wished to detract from its sterling, and indeed brilliant, character as a scientific exposition of Roman law. Of its kind it has in my opinion no superior, and it ought to be in the hands of every student of the subject.

Yours faithfully,

HENRY GOUDY.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

MARTIAL LAW HISTORICALLY CONSIDERED.

IN the Middle Ages martial law meant the law administered by the Court of the Constable and the Marshal. To that Court we must look for the origin both of the military and the martial law of the present day. Both these laws are the result of a development which dates from an early period in our constitutional history. Questions as to their meaning and extent have been at different periods political questions of the day. A body of law so ancient, and developed in such an atmosphere, is not easy either to state or to understand.

In 1389[1] we have a statutory definition and limitation of the jurisdiction of the Constable and Marshal's Court. Its vagueness is characteristic. 'To the Constable,' runs the statute, 'it pertaineth to have cognizance of contracts touching deeds of arms and of war out of the realm, and also of things that touch war within the realm, which cannot be determined nor discussed by the common law, with other ways and customs to the same matters pertaining, which other Constables heretofore have duly and reasonably used in their time.' It is clear that the Court exercised a certain jurisdiction over heraldry, over words spoken to the disparagement of men of honour, and over contracts relating to war made out of the realm[2]. But for the purposes of our inquiry the two most important branches of its jurisdiction were (1) jurisdiction over appeals of death or murder committed beyond the sea[3], and (2) 'the offences and miscarriages of soldiers contrary to the laws and rules of the army[4].' Both these branches of the Court's jurisdiction were recognized in the Middle Ages by the legislature[5] and by the judges[6].

[1] 13 Rich. II, St. 1, c. 2.

[2] Rushworth, pt. 2, vol. ii. 1054, 1055; *Roy* v. *Parker* (1668) Sid. 352; *Oldis* v. *Donmills* (1695) Shower, 58; 2 Knapp, 149 note. One of the cases cited by Rushworth is curious. A citizen of London went to a 'gentleman well descended,' and applied for payment of a debt. The gentleman not only refused, but gave him hard words. '"Then," said the citizen, "surely you are no gentleman that would not pay your debts, with some other reflecting language"; and the citizen underwent the censure of the court.'

[3] 1 Hen. IV, c. 14.

[4] Hale, History of the Common Law, 42.

[5] 8 Rich. II, c. 5; 13 Rich. II, St. 1, c. 2; 1 Hen. IV, c. 14.

[6] Hearne, Curious Discourses (ed. 1720), 259, 260, citing Y. B. 37 Hen. VI, Pasch. pl. 8, 'Whereby it appeareth that all the four justices agreed that the Constable and Marshal had a law by themselves, whereof the common law doth take notice, as well as it doth of the ecclesiastical law, being a law of itself from the common.' Hale, Common Law (6th ed.), 41 n. d. Fineux C.J., being asked by Henry VIII what was the Constable's jurisdiction, declined to answer, as it was a matter for the law of arms and not for the common law.

The office of Constable ceased to be permanently filled in Henry VIII's reign[1]. This was not at once thought to affect the jurisdiction of the Constable and Marshal's Court. But in the seventeenth century the judges of the Common Law Courts showed a disposition to question the legality of any rival Court. The victory of the Parliament in 1640 was followed by the suppression of the Council's jurisdiction in England. The Court of the Marshal shared in the end the same fate. It was voted a grievance in 1640[2]. In a case in Anne's reign it was decided that in the absence of the Constable the Court was not properly constituted, that if the Marshal alone had ever exercised jurisdiction it was a mere encroachment like the exercise of jurisdiction by the Court of Requests or the Council of York, and that it was not a Court of record[3]. In fact the jurisdiction of the Marshal's Court had become confined to pedigrees, escutcheons, pennons, and coat-armour. The last case known to have been tried in it was in 1737[4]. So completely had it disappeared that even Lord Mansfield seems to have been ignorant of its ancient jurisdiction. In *Lindo* v. *Rodney*[5] he said, 'As to plunder or booty in a mere continental land-war . . . it never has been important enough to give rise to any question about it. . . . There is no instance in history or law, ancient or modern, of any question before any legal judicature ever having existed about it in this kingdom.' It is almost certain that in the Middle Ages this was one of the branches of the Court's jurisdiction[6].

It is, as we have said, to the once extensive jurisdiction of this Court that the military and martial law of the present day owe their origin. To use the words of Coke, it was 'the fountain of marshal law[7].' For the present purpose the jurisdiction can be divided into two main branches which comprehend both of the two more important branches mentioned by Hale.

I. Jurisdiction over the soldiers of the Crown.

II. Jurisdiction over alien enemies.

[1] Hale, Common Law, 41. [2] Rushworth, pt. 2, vol. ii. 1056.

[3] *Chambers* v. *Jennings* (1701) 7 Mod. 125.

[4] *Sir H. Blount's* case, 1 Atk. 296; 3 Bl. Com. (1st ed.), 103-106.

[5] (1782) 2 Dougl. at p. 614, note to *Le Caux* v. *Eden*.

[6] Knapp, 149–152 and note; Hale's manuscript treatise on the prerogative there cited states: 'In matters civil, for which there is no remedy by the common law, the military jurisdiction continues as well after the war as during the time of it; for that part of the jurisdiction of the Constable and Marshal stands still. This is the proper jurisdiction of the Constable and Marshal, which, though it be called *curia militaris* in respect of the subject matter, yet the jurisdiction is a formal settled jurisdiction, and may be exercised as well in time of peace as war. This is that which is limited by the statute 13 Rich. II, c. 2, i. e. contracts touching deeds of arms, and war without the realm, and things that touch war within the realm, which cannot be determined by the common law, as touching prisoners, prize, &c.' See also a manuscript treatise of Lord Hale (there cited) 'upon certain petitions of late exhibited in the Court of Chivalry.'

[7] 4 Instit. c. 17.

I. Jurisdiction over the Soldiers of the Crown.

The army for which the Constable and Marshal's Court was designed was a feudal army. It was called into existence as occasion required. It was not, as in modern times, an army of professional soldiers backed up by an adequate police. We can hardly, therefore, expect to find the modern distinction between a jurisdiction over an army and a jurisdiction over the ordinary citizen in time of rebellion. Ordinary citizens were the soldiers of the Crown, and many of the wars we should now call rebellions. Changes in political manners and military organization will, as we shall see, account for much of the obscurity in which the subject of martial law has been enveloped in modern times. In considering the development of this branch of the jurisdiction of the Court we must anticipate later distinctions, and, for the sake of clearness, divide it into two heads—

1. Jurisdiction over the army at home and abroad—the military law of the present day.

2. Jurisdiction over all citizens in time of rebellion—the martial law of the present day.

1. *Jurisdiction over the army at home and abroad—the military law of the present day.*

'Always,' says Hale[1], 'preparatory to an actual war, the kings of the realm, by advice of the Constable and Marshal, were used to compose a book of rules and orders for the due order and discipline of their officers and soldiers, together with certain penalties on the offenders; and this was called martial law. We have extant, in the Black Book of the Admiralty and elsewhere, several examples of such military laws; and especially that of the ninth of Richard II, composed by the king, with the advice of the Duke of Lancaster and others.'

It is clear from this passage that this jurisdiction was defined by codes of rules promulgated by the Crown at different periods[2]. These codes are substantially embodied in the articles of war of the seventeenth, eighteenth, and nineteenth centuries, and in the Army Act of the nineteenth century. Mr. Clode says[3] that 'all the essential conditions in relation to the administration of justice can be traced in earlier codes, and that military law as a system, established and understood in the service, has been gradually developed and improved.' After the disappearance of the Court

[1] Common Law, 42.

[2] For an account of these rules see Cockburn's charge to the Grand Jury in *Reg. v. Nelson and Brand* (Special Report), 89–91, and Black Book of the Admiralty (R. S.), i. 282–299, 453–472.

[3] Military and Martial Law, 3.

of the Constable and Marshal the jurisdiction was exercised by committees of officers. Hawkins [1], with some hesitation, considers that the jurisdiction could be lawfully exercised in this manner. Its name also was changed. It becomes known not as martial but as military law. Cockburn C.J. criticized this change of terminology in *Reg.* v. *Nelson and Brand* [2]; but it is now well settled that the jurisdiction of the Crown over the army is called military law.

At common law this jurisdiction could be exercised over the soldier abroad [3]. Over the soldier within the kingdom it could only be exercised in time of war [4]. All doubt on this point was set at rest by the Petition of Right. The Petition of Right was in form a re-enactment of old law. After stating the old law which was to be re-enacted, and the manner in which it had been infringed, it prays that there may be no such infringements in future [5]. The clauses contained in it with reference to martial law enact nothing new. They assume that martial law was perfectly legal in time of war—a fact which the parliamentary lawyers did not dispute [6]. And in later times the Petition of Right has generally been taken to deal simply with the recent extensions which martial law had received, and to declare them illegal, leaving martial law only applicable to armies in time of war [7]. The question what was a time of war was also clearly settled. 'The time of peace is when the Courts of

[1] Pleas of the Crown (2nd ed.), ii. 14, and *Reg.* v. *Nelson and Brand*, 95, 96.

[2] Special Report, 100.

[3] 1 Hen. IV. c. 14. Cp. also Report by Sir James Marriott, King's Advocate, cited Forsyth, Leading Cases, 218.

[4] Hale, 1 P. C. 344 seqq., 499, 500.

[5] It recites (§ 6) that 'of late great companies of soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses'; (§ 7) that by 25 Ed. III and Magna Carta 'no man shall be forejudged of life or limb against the form of the Great Charter and the law of the land,' yet that divers commissioners have been appointed 'with power and authority to proceed *within the land*, according to the justice of martial law, against such soldiers or mariners, or other dissolute persons joining with them, as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanour whatsoever, *and by such summary course and order as is agreeable to martial law, and as is used in armies in time of war*,' to try and execute such offenders according to martial law; (§ 9) that offenders have escaped punishment 'upon pretence that the said offenders were punishable only by martial law.' It therefore prays (§ 10) 'that your Majesty would be pleased to remove the said soldiers and mariners,' and 'that the *aforesaid* commissions for proceeding by martial law may be revoked . . . and that hereafter no commissions *of like nature* may issue forth.'

[6] Coke, 1 Instit. 249; below, p. 122, notes 3 and 6.

[7] Hale, Common Law, 42; Analysis of the Law, 11; 1 P. C. 500; 1 Bl. Comm. 400; *Reg.* v. *Nelson and Brand*, 66; Stephen, Opinion on Governor Eyre's case (Forsyth, Leading Cases, 553–555), and History of Criminal Law, i. 207, 208. Blackburn J. in *Reg.* v. *Eyre* (Special Report, 73) says, 'I think it would be an exceedingly wrong presumption to say that the Petition of Right, by not condemning martial law in time of war, sanctioned it; still it did not in terms condemn it.' In *Reg.* v. *Nelson and Brand*, 66, Cockburn says that there are two views as to the effect of the Petition of Right: (1) that it was limited to the recent commissions; (2) that it forbade martial law except in the case of armies in time of war. It would be perhaps true to say that both views are correct; for the second is the consequence of the first. See below, p. 127.

Westminster are open.' 'If the Chancery and Courts of Westminster be shut up . . . it is time of war, but if the Courts be open it is otherwise; yet if war be in any part of the kingdom, that the sheriff cannot execute the king's writ, there is *tempus belli* [1].' With these opinions of Coke and Rolle agrees the opinion of Hale, who cites a case of Edward III's reign [2].

The definition was perhaps better suited to a feudal age than to the seventeenth century. This will appear from the difficulty which Charles I experienced in putting into force any kind of military law in 1640 [3].

With the Great Rebellion we reach the period of standing armies. The Parliament in 1642 found it necessary to issue a code of rules for the government of their troops [4]. Various codes of a similar nature were framed by Charles II and James II for the troops which Parliament permitted them to retain [5]. The code of 1666 was modelled on that of 1642. Others were drawn up in 1672 and 1686. But the Crown was careful to state in 1672 that it was only intended to enforce its provisions abroad; and in 1685, after the suppression of Monmouth's rebellion, Kirke was directed to send soldiers guilty of more serious crimes to the ordinary Courts for trial, as the articles of war were in force only during the actual rebellion [6]. In fact, the legality of applying any of these rules to the soldier in this country in time of peace was as doubtful as the necessity for some such rules was clear.

The Revolution begins a new epoch. Parliament legalized a standing army as a necessary evil. It controlled the powers of the Crown over it at home and in time of peace. It left subsisting the powers of the Crown over it abroad and in time of war [7]. From 1688–1879 military law rests partly upon the authority of

[1] Rushworth, pt. 2, vol. ii. App. 79, 81.

[2] Hale, 1 P. C. 344; Common Law, 42, 43.

[3] Rushworth, pt. 2, vol. ii. 1199. Lord Conway, in a letter to the Archbishop of Canterbury, says: 'My lord of Northumberland did write to me, that having had occasion to look into the power he hath to give commissions, the lawyers and judges are all of opinion that martial law cannot be executed here in England, but when an enemy is really near to an army of the king's, and that it is necessary that both my lord of Northumberland and myself do take a pardon for the man that was executed here for the mutiny; if this be so, it is all one as to break the troops, for, so soon as it shall be known, there will be no obedience.'

[4] Clode, Military and Martial Law, 10–12.

[5] Ibid. 12–19. [6] Clode, Military Forces of the Crown, i. 478.

[7] *Barwis* v. *Keppel* (1766) 2 Wils. 314, 318; Clode, Military and Martial Law, 74. The Bill of Rights (1 Will. & Mary, Sess. 2, c. 2) states that a standing army *within the kingdom in time of peace* is illegal. It is true that the preamble to the first Mutiny Act (1 Will. & Mary, c. 5) states generally that no man may be subjected to any kind of punishment by martial law. But the Act of Anne's reign (1 Anne, St. 2, c. 16) states that no man may be subjected *in time of peace* to any kind of punishment *within the realm* by martial law. The importance of preambles to Acts of Parliament upon a controverted political question may easily be exaggerated. See below, p. 126.

the annual Mutiny Acts, partly on the prerogative of the Crown expressed in the articles of war[1]. Into the history of the various modifications of the Mutiny Acts it is not intended to enter here[2]. It will be sufficient to say that they enlarged the powers of the Crown in so far as they gave the Crown power to make articles of war in time of peace and for the soldier within the kingdom; they restricted the powers of the Crown in so far that the Crown could not alter any rule laid down in the Mutiny Act itself[3]. But in cases where the Mutiny Act gave a discretion, or in cases where it was silent and the Crown had such a discretion at common law, the Crown could govern the army by its prerogative.

In 1879 the articles of war and many of the provisions of the former Mutiny Acts were embodied in a statute known as the Army Discipline and Regulation Act[4]. This code of rules for the government of the soldier comes into force for one year by virtue of the annual Mutiny Act.

Military law, therefore, now depends chiefly upon statute. In so far as the Army Act deals with subjects formerly dealt with merely by the articles of war, the prerogative of the Crown is restricted. The Act, however, expressly states that the Crown has power to make articles of war[5]. There is, however, a proviso that no punishment affecting life or limb, or penal servitude, shall be inflicted except for crimes made so punishable by the Act; and that no crime punishable by the Act shall be made punishable in a manner which does not accord with the provisions of the Act. This proviso is not limited, as the corresponding section of the Mutiny Act was limited, to persons within the United Kingdom.

This military law is a special code of rules administered by courts-martial, to which the persons defined by the Army Act are subjected[6]. To use the words of Cockburn C.J., 'military law as applicable to the soldier is a precise, ascertained, and well-defined law[7].'

2. *Jurisdiction over all citizens in time of rebellion—the martial law of the present day.*

The jurisdiction of the Crown over the army has thus gradually expanded into the system of military law. On the other hand, the jurisdiction of the Crown over all subjects in time of rebellion has gradually decayed, and has finally altered its shape.

[1] 1 Anne, St. 2, c. 16, § 39; 1 Geo. I, c. 9; 22 Geo. II, c. 5, § 57; Clode, Military and Martial Law, 29, 30.

[2] The first Mutiny Act contained 10 sections; the last passed in this form in 1878, 110 sections.

[3] Clode, Military Forces of the Crown, i. 502, 517.

[4] 42 & 43 Vict. c. 33, re-enacted with amendments 44 & 45 Vict. c. 58.

[5] 44 & 45 Vict. c. 58, § 69.

[6] Ibid. §§ 175–184.

[7] *Reg.* v. *Nelson and Brand*, 86.

We have seen that in the Middle Ages the Constable and the Marshal's Court had jurisdiction when it was 'a time of war.' We have seen that at a time when every citizen might be called upon to serve in defence of his country jurisdiction over soldiers might be easily confounded with a jurisdiction over all citizens. This confusion was increased by the policy pursued by the Tudors and the earlier Stuarts. They did not consider themselves bound by the legal definition of 'a time of war.' They considered that they might submit ordinary citizens to the jurisdiction of the Marshal or his deputies whenever in their opinion such a measure was necessary to the preservation of order. They may be said therefore to have extended his jurisdiction in two ways: (1) they extended to persons not members of an army powers which existed only over soldiers duly enrolled in the army; (2) they made a time of war mean a time of apprehended disturbance.

These extensions were gradually made, and it was difficult to prove that they were extensions[1]. The precise limits of the Constable and Marshal's Court had never been accurately defined. The change from the feudal monarchy of the Middle Ages to the territorial state of the present day left the extent of all kinds of political authority very obscure. The Tudors made use of this obscurity to assume the powers which they considered necessary for the maintenance of the peace. The Stuarts assumed similar powers, but not so much with the bonâ fide desire to keep the peace as in pursuance of their design to make themselves absolute kings. They pursued this design in the face of a rising parliamentary opposition, and they advertised it by a series of leading cases in constitutional law.

The arguments in these cases of the early Stuart period show how obscure the law really was. If we go back to the twelfth and thirteenth centuries we see none of that separation between the various bodies and persons entrusted with the powers of government to which we are accustomed. Henry II's *curia regis* was the legislature, the executive, and the judicature in one. In the seventeenth century these departments have become fairly distinct. But we see a similar confusion between legal principles, which in modern law we regard as perfectly separate. For instance, in *Bate's*[2] case and in the *Case of Ship-money*[3] we seem to be taken

[1] But it is clear that in Elizabeth's reign their legality was doubtful. Camden relates in his Annales, s. a. 1573 (cited Prothero, Documents, &c. 176), that a fanatic made an attack on Sir J. Hawkins, mistaking him for Hatton: 'Regina ad hoc facinus supra quam solebat ita excanduit, ut in hominem ex jure militari sive castrensi protinus animadverti jusserit; donec a prudentibus fuisset edocta, jus illud non nisi in castris aut temporibus turbulentis adhibendum; domi autem et in pace ex processus judiciaris formula agendum.'

[2] 1606, 2 S. T. 371.

[3] 1637, 3 S. T. 826.

over the whole field of constitutional law. In *Bate's* case the judgment considered the power of the Crown over trade, treaties, foreign affairs, and indirect taxation. That case showed the Crown that it could turn its powers over foreign trade to fiscal uses. In the *Case of Ship-money* the judgment considered the power of the Crown to provide for the defence of the country, and the measures which it could take when the safety of the country was in danger. In this case therefore the whole question of the extent of the power of the Crown to make use of martial law was exhaustively discussed. The power to make use of martial law was the premise from which the conclusion was drawn that the tax could be imposed. The Crown was seeking to turn to fiscal uses its powers to act in defence of the country, as in *Bate's* case it had turned to similar uses its power over foreign trade. It is true that the Petition of Right had negatived the supposed right to use martial law within the kingdom except in times of actual war. The Petition of Right was evaded by the ruling that it merely confirmed old liberties and enacted nothing new[1].

In the judgments given in this case we can see clearly the two different views held at that time as to the meaning of the term martial law. From these two different views we may trace historically a divergence of opinion upon this subject which has lasted until the nineteenth century.

The opinion of the majority of the judges was in favour of allowing to the Crown a power to proclaim martial law whenever the country was in danger; and of the existence of that danger they held that the Crown was the sole judge. It followed that in any case of apprehended danger the Crown could act as it pleased. The recent extensions of martial law were therefore upheld to their fullest extent. We may take as an illustration of these views a passage from the judgment of Finch C.J.[2]:

'In time of imminent danger, *tempore belli*, anything, and by any man, may be done, murder cannot be punished; yet, says my brother Crooke, the king cannot charge his subjects in any case without Parliament; no, not when the kingdom is actually invaded by the enemy. But truly I think, as he was the first, so he will be the last of that opinion. . . . There hath been and may be as great danger when the enemy is not discerned as when in arms and on the land. In the time of war when the course of law is stopped, when judges have no power or place, when the courts of justice can send out no process, in this case the king may charge his

[1] 3 S.T. at p. 1109, Berkeley J., dealing with the Petition of Right, quotes Charles I's speech to the two houses, 'that it must needs be conceived that he had granted no new, but only confirmed the ancient liberties.' Finch C.J. at p. 1237 says, 'There was no new thing granted only the ancient liberties confirmed.'

[2] 3 S.T. at p. 1234.

subjects, you grant. Mark what you grant; when there is such a confusion as no law, then the king may do it. *Dato uno absurdo, infinita sequuntur.* Then there may be a time of war in one part of the kingdom, and the courts of justice may sit. Now whether a danger be to all the kingdom or to a part, they are alike perilous, and all ought to be charged ... Expectancy of danger, I hold, is sufficient ground for the king to charge his subjects; for if we stay till the danger comes, it will be then too late. And his averment of the danger is not traversable, it must be binding when he perceives and says there is a danger; as in 1588 the enemy had been upon us, if it had not been foreseen and provided for before it came.'

The opposite view is best represented in the argument of Mr. Holborne, one of Hampden's counsel. He maintained that mere expectancy of danger gives no additional powers to the Crown. It is only the actual presence of pressing danger which gives to the Crown and to the subject alike the right to do what is necessary to ward off the danger.

'Put the case an enemy was landed, to show what the powers are by our laws in that case for defence; when there is particular appearance of instant and apparent danger, in that case particular property must yield much to necessity. These cases our books warrant, as building of bulwarks on another man's ground, and burning corn. In 1588 there was an actual danger, and then it was just to take corn or grass or anything to raise supplies. But where do any of our books say that upon fear of danger, though in the king's case, a man can without leave make a bulwark in another man's land? I do not read. As your lordships may observe in this case of apparent danger the power of the king; observe withal the power of the subject, and out of what principle this doth grow; whether out of a form of law or out of necessity. In these cases of instant danger and actual invasion, it is not only in the power of the king, but a subject may do as much in divers cases. For if there be an actual war, the subject may, without any direction, do any act upon any man's land, and invade any property towards defence: it is the law of necessity that doth it. Nay in that case the subject may prejudice the king himself in point of property ... *Levis timor* will not serve ... but such a fear as ariseth from an actual and apparent danger [1].'

It was clear from the Petition of Right that the actual decision in the case of Ship-money was wrong. It was clear that the Crown could not make use of martial law in a case of merely apprehended danger when the ordinary Courts were sitting [2]. But, granted the

[1] 3 S. T. at p. 975; cf. pp. 1012, 1013. And Crooke J. at p. 1162, 'Royal power, I account, is to be used in cases of necessity and imminent danger, when ordinary courses will not avail ... as in cases of rebellion, sudden invasion, and some other cases, where martial law may be used, and may not stay for legal proceedings.'

[2] *Wolfe Tone's* case (1798) 27 S. T. 613.

existence of an instant and pressing danger, was there not some power in the Crown to make use of some form of martial law? Was this martial law merely an illustration, as Holborne had contended, of the right of rulers and subjects to use in an emergency the force necessary to protect life and property?

The question was difficult to answer. Martial law was a term known to the law books. But it was clear that the Constable and Marshal's Court, which originally administered it, had passed away, and that the most important branches of the jurisdiction of that Court were now administered by courts-martial acting mainly under statutory authority. It was clear that the law so administered was a law which could be applied only to a certain defined class of persons. It might however be argued that if the Crown had once had a prerogative to govern ordinary citizens by martial law in the case of a rebellion which amounted to a war, and if that prerogative had never been taken away, it still existed. Some weight is given to the view that the Crown possessed this prerogative by the preambles and recitals of certain statutes relating to Ireland. 39 Geo. III, c. 11, passed by the Parliament of Ireland for the statutory exercise of martial law, mentions in the preamble 'the wise and salutary exercise of His Majesty's undoubted prerogative in executing martial law'; and the same Act goes on to provide that, 'nothing in the Act contained shall be construed to take away, abridge, or diminish the acknowledged prerogative of His Majesty for the public safety to resort to the exercise of martial law.' 43 Geo. III, c. 117 contains a reservation of this 'undoubted prerogative'; and there is a similar reservation in 3, 4 Will. IV, c. 4, s. 40. Blackstone, following Hale, speaks of it as a thing permitted in time of war in order to preserve discipline in the army[1]. He does not identify it with the code of military law in force by virtue of the Mutiny Acts[2]. It has therefore been contended with some force that a prerogative to exercise martial law in case of rebellion still remains vested in the Crown[3].

Rebellion, it is said, is a state of war declared by the Crown[4]. It can, of course, only be declared if a state of war, as defined by the older authorities, really exists. This state of war gives to the Crown the power to use the military forces of the State as it

[1] 1 Bl. Comm. 400.

[2] Ibid.: 'At such times [in times of foreign war] particular provisions have been usually made for the raising of armies and the due regulation and discipline of the soldiery; which are to be looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part of the permanent and perpetual law of the kingdom.' At p. 402 he treats separately of the Mutiny Act.

[3] Finlason supported this view in several works—Treatise on Martial Law; Review of the authorities as to the repression of riot and rebellion; Commentaries on Martial Law.

[4] Treatise, xii; Review, 53, 54.

pleases. Its prerogative is not controlled by the Mutiny Act, which deals only with the regular army as defined by the Act[1]. Persons, therefore, acting under such a proclamation of martial law do not need acts of indemnity for their protection unless they have acted wantonly and without good faith[2]. This prerogative is quite different from the power which all citizens have at common law of using the degree of force which is necessary to prevent outrage. That power merely provides the necessary means for quelling a riot. It merely allows an amount of force exactly proportioned to the necessities of the case. It does not allow, as a proclamation of martial law allows, an absolutely free hand in dealing with the enemy[3]. It is contended that the preambles of the Acts cited bear out this view; and it must be admitted that probably those who passed them did mean something of the kind. Hargrave certainly thought that they must bear this construction[4].

There seem to be two objections to this view. (1) Suppose that the Constable and Marshal's Court would have had jurisdiction to try by martial law any persons actually combatant in case of rebellion, would this necessarily give the Crown power to subject to martial law all citizens combatant or non-combatant? To contend that this was so would seem to be an extension of the term martial law similar to that made by the Tudors, and condemned by the Petition of Right. It can only be said that it is not clear that the jurisdiction of the Court would not have extended to this case. But this would be contrary to the opinion of the parliamentary lawyers of the early Stuart period, and to the opinion of Hale[5]. It is perhaps not possible to say certainly whether the Court would have had jurisdiction in such a case. (2) If the Constable and Marshal's Court had jurisdiction, and if therefore the right of the Crown to try persons by martial law could be established, we should have the anomaly of a law without a Court to administer it. To a body of law in so destitute a condition the description of Cockburn C.J.[6] would seem very applicable. 'Martial

[1] Commentaries, 16, 18, 19, 93; Review, 58.
[2] Treatise, xii; Review, 46–48.
[3] Treatise, xxxi; Commentaries, 18, 19, 119, 120.
[4] Forsyth, Leading Cases, 190: 'With these statutes before me I am forced to resist any contrary impressions I may have as to the real boundary of martial law.' See the views of Mr. Headlam (Judge Advocate General) and Sir David Dundas, cited *Reg.* v. *Nelson and Brand*, 101–103.
[5] Common Law, 42: 'This indulged law was only to extend to members of the army, or to those of the opposite army, and never was so much indulged as intended to be executed or exercised upon others. For others, who had not listed under the army, had no colour or reason to be bound by military constitutions, applicable only to the army, whereof they were not parts. But they were to be ordered and governed according to the laws to which they were subject, though it were a time of war.' (The reference in the Petition of Right to martial law 'as is used in armies in time of war' (above, p. 120, n. 5) points in the same direction.)
[6] *Reg.* v. *Nelson and Brand*, 86.

law,' he says, 'when applied to the civilian is no law at all, but a shadowy, uncertain, precarious something, depending entirely on the conscience, or rather on the despotic and arbitrary will of those who administer it.' He arrived independently at the same conclusion as Holborne and the parliamentary lawyers of the seventeenth century. Martial law as a distinct code of rules does not exist. It is merely the application of the common law principle 'that life may be protected and crime prevented by the immediate application of any amount of force which, under the circumstances, may be necessary [1].'

This is the view most strongly supported, especially by the more recent authorities. It is the view of Comyn [2] and Lord Loughborough [3]. It is the view which Hargrave would have considered to be law but for the preambles to the Irish statutes cited above [4]. These statutes Cockburn C.J. explains away [5]. And whatever we may think of the explanation it must be allowed that the necessity for comprehensive Acts of indemnity whenever martial law has been put in force is a strong argument in favour of this view. Such Acts do not as a rule cover cases of wanton wrongdoing. This is the only reason for their existence upon the contrary hypothesis [6]. It is the view which has been taken by distinguished law officers of the Crown [7]. It is the view which seems to be adopted by the government in the circular upon the subject of martial law addressed in 1867 to the governors of our colonies [8]. It is the view which is taken by Stephen in his opinion on Governor Eyre's case [9], and in his history of Criminal Law [10].

There are many points of agreement between the two theories. Moreover we shall see that in practice their results are not materially different. Both demand as conditions precedent of a proclamation of martial law a state of war, i. e. a condition of affairs in which it is absolutely necessary to use force. The great point of difference consists in the consequences to the persons acting under such a proclamation. On the first theory the person so acting cannot be made civilly or criminally responsible unless he has acted with malice. On this theory it is only in cases of

[1] *Reg.* v. *Nelson and Brand*, 85.
[2] Digest, Parliament. H. 23.
[3] *Grant* v. *Gould* (1792) 2 H. Bl. 69, 98.
[4] Forsyth, Leading Cases, 190.
[5] *Reg.* v. *Nelson and Brand*, 72–74. He says that a recital is of great value as forming a presumption as to what the law is, but that it is not conclusive; that it was there weakened because it was not needed, as, whether the Crown had the power to use martial law or not the legislature gave it; that a reservation of the power could give no right if it did not already exist.
[6] *Wright* v. *Fitzgerald* (1799) 27 S.T. 759.
[7] Forsyth, Leading Cases, 188 (Opinion of Henley and Yorke, 1757); 194 (Opinion of Sir J. S. Copley, 1824); 198, 204 (Opinions of Sir J. Campbell and Sir R. M. Rolfe, 1838 and 1839).
[8] Clode, Military Forces of the Crown, ii. 667.
[9] Forsyth, Leading Cases, 551.
[10] i. 207–216.

riot as distinguished from cases of rebellion that a person is civilly or criminally responsible unless he accurately apportions the degree of force used to the necessity of the case. On the second theory there is no such distinction to be drawn between cases of riot and cases of rebellion. The same principles apply to both; for rebellion is but riot 'writ large.'

The law, then, acts on the same principles in judging the conduct of those who have acted under a proclamation of martial law, and in judging the conduct of those who have used force to suppress a riot. The proclamation in no way adds to the powers inherent in the government of using force to suppress disorder. 'The proclamation must be regarded as the statement of an existing fact rather than the legal creation of that fact[1].'

The question then arises, what are the rights and duties of those who are thus obliged to use force to suppress disorder?

When riot approaches rebellion, when it practically amounts to a state of war, as the necessity is greater, so the discretion of those whose duty it is to restore order is more free. A proclamation of martial law during a rebellion, or shortly before it has been entirely quelled, practically gives to those in authority full powers to do all that is necessary to restore order[2]. Only acts clearly malicious could give rise to subsequent legal proceedings. This is illustrated by the case of *Elphinstone* v. *Bedreechund*[3]. Elphinstone was appointed (1817) sole commissioner of a territory in India conquered from Bajee Row, the Peishwa. In Feb. 1818 he issued a proclamation describing the measures to be taken for the settlement of this territory, and appointed Captain Robertson provisional collector and magistrate of Poonah, the capital of Bajee Row's territory. Since that date certain Courts had been sitting at Poonah. The Peishwa surrendered June, 1818. The war did not end till the December of that year. In May Robertson had seized and imprisoned Narroba, the treasurer of the Peishwa, until he gave up certain money alleged to be the property of the Peishwa. Bedreechund, the executor of Narroba, sued Robertson and Elphinstone in the Supreme Court of Bombay for this money. The Supreme Court of Bombay decided that, the Courts being open, the war was over at the time when Narroba was thus imprisoned,

[1] Opinion of Mr. Cushing, Attorney-General of the United States, viii, Opinions of Attorney-Generals at p. 374.

[2] The Lord Chancellor, in the case of *Marais* v. *The General Officer commanding the lines of communication and the Attorney-General of the Colony* [1902] A. C. 109, said at p. 115, 'Doubtless cases of difficulty arise when the fact of a state of rebellion or insurrection is not clearly established . . . but once let the fact of actual war be established, and there is an universal consensus of opinion that the civil courts have no jurisdiction to call in question the propriety of the action of military authorities.'

[3] (1830) 2 S. T. N. S. 379.

that the property belonged to Narroba, and that therefore Bedreechund could recover it. This decision was reversed by the Privy Council. Lord Tenterden said[1], 'We think that the proper character of the transaction was that of hostile seizure made, if not *flagrante* yet *nondum cessante bello*, regard being had both to the time, the place, and the person; and consequently that the municipal Court had no jurisdiction to adjudge upon the subject.' The case of *Marais* was, in all essential particulars, identical with the case *Elphinstone* v. *Bedreechund*, and was decided in the same way[2]. When the Courts are sitting it is no doubt a time of peace—but, subject to the qualification established by these two cases, that they are sitting in their own right and not merely as licensees of the military power.

Where the case is a case of riot rather than a case of rebellion, as the necessity is less, so the discretion of those concerned in restoring order is more limited. The principles upon which the Courts will act are most clearly pointed out in Lord Bowen's report upon the Featherstone riots[3]. On the one hand, the magistrate is responsible if he neglects to take proper precautions for preserving the peace[4]; and the ordinary citizen, whether a soldier or not, is liable if he does not assist to preserve the peace when required to do so[5]. On the other hand, any person who uses more force than the necessity of the case requires can be made criminally or civilly responsible for the consequences of using excessive force. 'He is bound,' said Littledale J.[6], 'to hit the exact line between an excess and doing what is sufficient.' Mere honesty of intention will be of no avail if he has not come up to the standard which the law requires. But honesty of intention is good evidence to show that he has fulfilled his legal duty by doing or abstaining from doing all that can reasonably be expected from a man of honesty and ordinary prudence and activity, under the circumstances in which he was placed[7]. In coming to a decision upon this question it is only the actual circumstances, in which the person was then placed, which can be considered. Events subsequently occurring, which no person of ordinary foresight would expect, cannot be regarded[8].

'The framers of the Petition of Right,' said the Lord Chancellor,

[1] 2 S. T. N. S. at p. 449.

[2] [1902] A. C. 109. [I cannot regard it as an unessential distinction that in *Elphinstone* v. *Bedreechund* there had never been any regular British jurisdiction in the territory in question.—Ed.]

[3] Parliamentary Reports, 1893, 94.

[4] *Rex* v. *Kennett* (1781) 5 Car. & Payne, 282.

[5] The *Case of Arms* (1597) Popham's Rep. 121; *Burdett* v. *Abbott* (1812) 4 Taunt. 401, 449.

[6] Trial of *Charles Pinney* (1832) 3 S. T. N. S. at p. 510; *Reg.* v. *Eyre* (Blackburn J.), Special Report, 55, 56.

[7] 3 S. T. N. S. 511, 512.

[8] Ibid. 514.

'knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure[1].' Substantially the same distinction between a time of peace and a time of war is recognized in modern law. In this, as in other branches of the law, it is the views of the lawyers who framed the Petition of Right and who argued the *Case of Ship-money* which have prevailed. The rise of a standing army, the growth of military law, the disappearance of the Court of the Constable and Marshal may perhaps cause some difference in the terms in which we express the modern law. But, 'when ancient rules maintain themselves . . . new reasons more fitted to the time have been found for them, and they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted[2].'

II. Jurisdiction over Alien Enemies.

It is clear that the power of the Crown over alien enemies rests upon principles quite different to those which govern the power of the Crown over the army or over its own citizens. (1) Wrongs committed by or against an alien in a foreign country do not, as a rule, fall within the jurisdiction of the English Courts[3]. (2) Wrongs committed by or against an alien friend in this country are tried by the ordinary Courts[4]. (3) Wrongs committed by an alien enemy in this country cannot be treated as ordinary crimes. 'An alien enemy occupies a portion of the British territory, as the territory of his own sovereign; the laws of his own country are supposed to prevail there as far as he is concerned, and he owes exclusive and undivided allegiance to his own sovereign. If he is captured he is to be treated as a prisoner of war; he can in no shape be tried as an offender for any act of hostility in which he may have participated[5].' It would appear from Perkin Warbeck's case that such offences fell within the jurisdiction of the Constable and Marshal's Court. It was decided that Perkin Warbeck, being taken in war, could not be indicted for treason as the indictment could not conclude *contra ligeantiae suae debitum*; and that therefore he must be tried before the Constable and the Marshal by martial law[6]. Seeing that this Court does not now exist, it would raise an interesting question whether such an alien enemy in this country could be tried at all, if the war was over, and the ordinary Courts sitting. It is possible that he might escape altogether[7].

[1] [1902] A. C. 115. [2] Holmes, The Common Law, 36.
[3] Stephen, History of Criminal Law, ii. 12.
[4] Forsyth, Leading Cases (Opinion of Sir J. Dodson, Sir J. Campbell, and Sir R. M. Rolfe, 1838), at pp. 200, 201.
[5] Ibid. [6] (1500) cited 7 Co. Rep. 6 b. [7] Forsyth, 201–204.

(4) In the case of alien enemies in a foreign country the Crown has an absolutely free hand.

It is clearly this species of martial law which the Duke of Wellington had in his mind when he gave his well-known description of martial law. 'Martial law,' he says, 'is neither more nor less than the will of the general who commands the army. In fact martial law means no law at all; therefore the general who declares martial law, and commands that it should be carried into execution, is bound to lay down distinctly the rules and regulations and limits according to which his will is to be carried out. Now I have in another country carried out martial law; that is to say, I have governed a large proportion of a country by my own will. But then what did I do? I declared that the country should be governed according to its own national law; and I carried into execution this my so declared will.' Martial law, in this sense, differs *in toto* from that described above. It is altogether outside the range of municipal law. This distinction is perhaps most clearly pointed out by Mr. Cushing in an opinion which he gave when Attorney-General of the United States[1]. 'Martial law must be distinguished according as it is a foreign or international fact, or as it is a domestic or municipal fact. As exercised in any country by the commander of a foreign army, it is an element of the *jus belli*. It is incidental to the state of solemn war, and appertains to the law of nations. The commander of an invading, occupying, or conquering army rules the invaded country with supreme power, limited only by international law and the orders of the sovereign or government he serves or represents. By the law of nations, *occupatio bellica* in a just war transfers the sovereign power of the enemy's country to the conqueror. Such occupation by right of war, so long as it is military only, *flagrante bello*, will be the case put by the Duke of Wellington of all the powers of government resumed in the hands of the commander-in-chief. . . . This does not enlighten us as to martial law in one's own country and as administered by its military commanders. That is a case which the law of nations does not reach.'

In fact, the only reason why powers so dissimilar are called by the same name of martial law is the purely historical reason that they all formed branches of the jurisdiction of the Constable and Marshal's Court.

W. S. Holdsworth.

[1] viii, Opinions of Attorney-Generals at p. 369.

MARTIAL LAW.

THE words 'Martial Law' have been adopted as the title of this article because they are convenient to direct attention generally to the subject it is desired to discuss, but we do not propose to deal only with that species of martial law which consists of trial by Military Courts, or infliction of penalties without the sanction of a Court of Law, to which the term is often restricted, but rather to consider the broader questions, viz. whether a British commander has any right which the civil courts will recognize to supersede the ordinary law in this country in time of war, and whether he can have, apart from an Act of Indemnity, any defence to an action subsequently brought against him for acts admittedly illegal if committed in time of peace.

And at the outset it seems proper to clear away one subject which is within the ambit of this heading, but which is not material to this wider question, and has indeed greatly confused investigation into it. With the 'martial law' applicable to soldiers we have nothing to do. That law was formerly enforced by the Court of the Constable and Marshal, and was applied to maintain discipline in the army, to decide disputes relating to booty, and to deal with prisoners taken in war, whether aliens or rebels. The Court lapsed in the reign of Henry VIII, and the powers formerly exercised by it were after that time vested in Commissioners, as occasion arose, in time of war or rebellion, by virtue of the prerogative of the Crown. It is important to bear this in mind, because the 'prerogative of the Crown to proclaim martial law,' a phrase which frequently recurs in discussions on this subject, seems properly referable only to the right to ordain articles of war for the discipline of the army. Since the first Mutiny Act it has been unnecessary to exercise this prerogative in the United Kingdom, but it remains still in existence except in so far as it may be impliedly repealed in cases to which that Act applies. It would, we presume, be exercised in the case of levies for local service in the Colonies or Protectorates, or of other forces not within the Army Act. Courts composed of military officers sitting to try non-belligerents in time of war, do generally in practice follow the procedure prescribed for Courts Martial under the Army Act, but this is solely because that procedure happens to be familiar to

them. They are not in such cases acting under the Army Act, and can adopt any other procedure at their pleasure.

Turning then to the main question—whether a military commander has any right in time of war to supersede the ordinary law—the first observation to be made is that whether legal or illegal, such action must be in most cases imperatively necessary, and that a military commander who declines to step outside the limits of the law applicable in time of peace, will conspicuously fail in his duty. This is admitted even by those who contend that there can be no legal justification for such action; they do not deny that the action must be taken, but say that the commander must rely on the prospect of a subsequent Act of Indemnity. If this be so the result is, to say the least of it, remarkable. The law which the commander is bound to obey is in direct contradiction; by one part of it he is bound to take such action as may be necessary for the safety of the realm, by another part he is forbidden to trespass on the liberty or property of any subject, and without so doing he cannot make that action effective. If he fail to act he may be indicted for misdemeanour, or subjected to penalties by military courts acting under the Army Act; if he does act he may in some cases be subjected to criminal proceedings, and will in any case be personally liable to pay damages to every individual whose rights of liberty have been restricted or whose property has been injured. The effect of this contention must, in short, be that the commander is bound by the law to do what the law declares to be illegal, and in some cases is bound to commit a criminal offence. The proposition so stated seems at least to supply the very strongest inference that there is in law a sanction for action which the law requires to be taken.

But let us consider the extent of the interference with the rights of individuals which a commander must necessarily insist on if he is to offer effective resistance to an enemy who, we will assume, has already effected a landing in this country. And first, with regard to property; it is obvious that he must wholly disregard the law of trespass to real property. No military operations can be carried on unless the troops can enter on private property; can throw up entrenchments and construct other military works; can destroy houses or other structures which interfere with their action or afford assistance to that of the enemy. Is the ordinary law of property to be superseded on such occasions, or is it to remain in force unabated? This question has not received the consideration of lawyers in recent times, owing to the long-continued immunity from war which this country has fortunately enjoyed, but there are numerous old authorities all of which are

unanimous in declaring the law to be, that in such cases the rights of the individual are subordinated to the necessities of the State, and that no action will lie for damage to property caused by military operations in time of war. The principle is that embodied in the maxim *Salus reipublicae suprema lex.* It may be useful to refer to one or two of these authorities. In 1537, according to the report of Sir John Dyer, the judges had this very question before them, and declared the law in the following terms:—

'Yet we will well agree that in some cases a man may justify the commission of a tort, and that is in cases where it sounds for the public good, as in time of war a man may justify making fortifications on another's land without license' (1 Dyer, 36 b).

Again, in 1606, all the judges, viz. Popham C.J., Coke C.J., Fleming C.B., Fenner, Searl, Yelverton, Williams, and Tanfield JJ., resolved that

'when enemies come against the realm to the sea coast it is lawful to come upon my land adjoining to the same coast to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. And therefore, by the common law, every man may come upon my land for the defence of the realm, as appears 8 Ed. IV. 23, and in such case or such extremity they may dig for gravel for the making of bulwarks: for this is for the public, and every one hath benefit by it. . . . And in this case the rule is true *Princeps et respublica ex justa causa possunt rem meam auferre*' (12 Rep. 12)[1].

Numerous other authorities from the Year Books and other sources are to be found in the argument in the well-known 'Ship-Money' case (*R.* v. *Hampden*, 3 St. Tr. 826). It will be remembered that in that case it was sought to justify the writ for the collection of ship-money, on the ground that it was within the powers of the king to act for the defence of the realm: a suggestion clearly untenable in the circumstances of the occasion and on the terms of the writ. There was no more learned lawyer at that time than St. John, who was leading counsel for Hampden, and no more staunch upholder of the rights and liberties of the subject, but we find him admitting from the first that in time of war those rights could be lawfully subordinated to the interests of the realm.

'My Lords,' he says, 'in these times of war I shall admit not only His Majesty but likewise every man that hath power in his hands may take the goods of any within the realm, pull down their houses or burn their corn to cut off victuals from the enemy, and do all other things that conduce to the safety of the kingdom without respect had to any man's property.'

[1] [The twelfth Part of Coke's Reports is well known to be of inferior authority: but there is no reason to doubt that this passage is a substantially correct statement of accepted opinion. Observe that the right, as asserted, is not confined to military or other officers of the Crown.—Ed.]

Holborne, the second counsel for Hampden, agreed:—

'Put the case an enemy was landed to show what the powers are by our laws in that case for defence: when there is particular appearance of instant and apparent danger, in that case particular property must yield much to necessity. In 1588 there was actual danger, and then it was just to take corn or grass or anything to raise supplies. . . . In these cases of instant danger and actual invasion it is not only in the power of the king, but a subject may do as much in divers cases. For if there be an actual war the subject may, without any direction, do any act upon any man's land and invade any property towards defence: it is the law of necessity that doth it. . . . In this case there is no manner of mischief if subjects' goods be taken by the king or any man, and in that instant necessity be employed for the public good.'

The arguments of Littleton and other counsel and the judgments of the judges contain similar admissions, but specific reference has been made only to the counsel for Hampden because they cannot be accused of bias in the king's favour. It would have greatly assisted their argument if they had been able to contend that the ordinary law prevailed even in times of necessity, but this they felt unable to do.

Some 150 years later we find the law laid down by Buller J. in similar terms:—

'There are many cases,' he says, 'in which individuals sustain an injury for which the law gives no action: for instance, pulling down houses or raising bulwarks for the preservation and defence of the kingdom against the King's enemies. The civil law writers indeed say that the individuals who suffer have a right to resort to the public for a satisfaction; but no one ever thought that the common law gave an action against the individual who pulled down the house, &c. This is one of those cases to which the maxim applies, *Salus populi suprema est lex*' (4 T. R. at 797).

In later times this statement of the law has received confirmation from the high authority of Willes J. (4 C. B. N. S. 345), and although the particular case in which he delivered that opinion has been disapproved of in other respects the dictum itself remains unchallenged.

There is, then, an unbroken sequence of authority from the earliest Year Books down to 1858 for the proposition that the law of property is subordinated in time of war to military necessity, and it is believed that no single decision to the contrary is to be found in the records of the law. That such a rule is consistent with common sense is clear; indeed it would be in practice impossible to protect private property at such times. Assume that an owner applied to the High Court for protection against a

threatened trespass on his property by the military for the purpose of their operations. On what grounds could the Court refuse relief in such a case if the acts complained of were without doubt illegal? It is certain that no court could hamper the action of the military in their actual conduct of operations, but to refuse an injunction in such a case would of itself be an acquiescence in the suspension of the law. The difficulty of enforcing the law is not of itself conclusive against the existence of a remedy, but it is an argument of a practical kind in favour of the rule which is enunciated in the authorities we have cited. It is for these reasons submitted that interference with rights of property necessitated by military operations is not illegal in time of war, and that no action will lie in respect of it.

Let us next consider whether the same rule applies to rights of personal liberty. Assuming that we have stated the law correctly in regard to rights of property, can there be any difference in regard to rights of liberty? It is clear that there can on principle be none. Rights of property are entitled to the protection of the law equally with rights of liberty: the necessity of the State is as great in the case of one as of the other. Indeed that some rights of liberty must be interfered with by military operations is as certain as that there must be interference with some rights of property. A commander must, for instance, have power to control the movements of non-combatants on the actual field of hostilities or on his line of communications: he must have power to control them in his camps or in the towns which he defends against the enemy. The same considerations must apply to such a case as those which apply to the case of property; indeed the two classes of rights would in some circumstances be involved in the same action and must then be governed by the same considerations. It would be absurd, for instance, to admit that a commander may pull down a house but to contend that he has no power to remove the occupants from it by force if they refuse to go willingly.

It so happens that the authorities we have cited deal directly only with rights of property and not with rights of person, and we have not been able to find any exact statement of the operation of the principle of necessity in regard to the liberty of the subject. But the one would seem to follow from the other. It is impossible to draw any distinction at any rate in the kind of cases we have suggested, and it is to be observed that once it be admitted that liberty may be interfered with in any one case or class of cases, then it is impossible to contend that interference cannot be justified in all cases to which similar considerations apply.

The attention of the public is in general focussed on that part

of martial law which consists of the trial and punishment of non-combatants, but that is in truth only part, and a small part, of the general power of the commander for which we have contended. It is a necessary complement of his power of control. If, for instance, he has the power of controlling the movements of the civil population in a besieged town, it is obvious he must have the power of punishing those who refuse to obey his orders, for without that power his control cannot be made effective. In the same way in the districts occupied by his troops it is necessary that he should have like powers. It is indeed said that the civil courts can provide adequate sanction for his orders. But this is not so. Many of the offences which have to be suppressed are offences, not against the ordinary law, but against some rule, which for military reasons the commander has found it necessary to enact. These are not offences which could be punished by the civil courts. Moreover the machinery of those courts is wholly unsuited to the circumstances of war. Their action must be more or less slow: it is essential in time of war that punishment should follow immediately on the offence. They would require the attendance of military witnesses both at the preliminary investigation and on the trial when the Assizes came round. But this would in fact be impossible to secure without detriment to the actual conduct of the war. They would require the publication of evidence, but secrecy is in general vital in such circumstances, and the fact that the evidence if given would be put within the reach of the enemy would of itself be prohibitive of proceedings in many cases. Moreover the system of trial by jury is itself impracticable in disturbed districts, because it is impossible there to secure an impartial panel. At this moment, for instance, in Cape Colony every inhabitant is a partisan of one side or the other and therefore not in a position to sit in judgment in such cases. It is indeed impossible for the civil courts to provide for the effective suppression even of offences against the civil law by the machinery at their disposal. It was for reasons of this kind that Lord Brougham in the Demerara debate admitted that in presence of a great emergency, e. g. invasion or rebellion, when there is no time for the slow and cumbrous proceedings of the civil law, a proclamation might be justifiably issued for excluding the ordinary tribunals.

The facts in the recent case of *Marais* ([1902] A. C. 109) are an illustration of these difficulties. The prisoner there was accused under a 'Martial Law Regulation' which made it an offence to incite others to take up arms against His Majesty. It was argued on his behalf that the civil courts could have adequately dealt with such an offence, but when the matter is considered it becomes

obvious that the ordinary law would be far too cumbrous a weapon to deal with the bulk of offences which would come within the scope of this Regulation. We are not familiar with the Cape law of Treason, but assuming the incident to have occurred in a Colony where English law prevailed, the only possible course would have been to indict the prisoner for high treason under 25 Ed. III. And if a conviction were obtained the necessary consequence must be sentence to death. We know nothing of the evidence against Marais or of the details of the offence alleged against him, but the penalty of death would in general be too severe to be effective in the circumstances prevalent at the time in Cape Colony. It is necessary to deter those who sympathize with the Boers from affording actual assistance to their forces, but to declare that the penalty for affording such assistance, however unimportant it may be, is death must be ineffective: the severity of the punishment would prevent any conviction being obtained, and the military commander would in effect be powerless to suppress disloyalty of this kind because there was no provision of the law apt to deal with it.

To summarize the contentions advanced they are as follows:—

1. Military operations cannot be conducted in time of war without interference with rights of property, and the authorities show that interference in such cases is not contrary to law.
2. Interference with personal liberty is equally a matter of necessity, and the same principle must apply as in the case of property.
3. Such interference must include the right of trial and the infliction of punishment.

A proclamation of martial law is not, if this view be correct, in any way essential to the exercise of these powers: it is a convenient notification to the inhabitants that the commander has assumed control of the district, but it in no way affects the legality or illegality of his action.

It may, however, be said that even assuming that some acts of this character can be justified on the ground of necessity, it must be left to the courts to determine whether any particular act be or be not in excess of the necessity of the occasion in question in each case. That in times of emergency, falling short of war, the court may decide whether there was sufficient necessity to justify any suspension of the ordinary law is undoubted; indeed there would be no security for the subject at any time if it were left to the uncontrolled discretion of the military to take such action at their pleasure. But when once war is declared and is raging in the country, that question is no longer open to doubt: that it is then necessary to interfere with the ordinary law to some extent is

certain, and unless it be alleged that a defendant was not acting bonâ fide for military purposes the courts will not embark on an inquiry as to the necessity of any particular action. Such a question, indeed, could not properly be determined by civilians; it must depend on purely military considerations of which the civil courts are, from their constitution, entirely unfitted to form any opinion.

That this is the law of England has now been definitely declared by the decision of the Privy Council in the case referred to:—

'The truth is,' says the Lord Chancellor in stating the reasons for their Lordships' report, 'that no doubt has ever existed that where war actually prevails the ordinary courts have no jurisdiction over the action of the military authorities. Doubtless cases of difficulty arise when the fact of a state of rebellion or insurrection is not clearly established. It may often be a question whether a mere riot or disturbance neither so serious nor so extensive as really to amount to a war at all, has not been treated with excessive severity, and whether the intervention of the military force was necessary: but once let the fact of actual war be established and there is a universal consensus of opinion that the civil courts have no jurisdiction to call in question the propriety of the action of military authorities.'

It cannot be denied that this decision has met with some criticism even from those whose legal vision is not coloured by their political sympathies, but if the argument suggested above be correct, it follows that on the main point, namely the right to interfere with the liberty of the subject in time of war, the report is in accord with the principle of the older authorities, and merely restates the law which has prevailed in this country from the earliest period, although from want of occasion, it has not been called into actual operation within recent times. The further question whether on the restoration of peace actions will lie for acts done bonâ fide but alleged to have been in excess of the necessity of the particular occasion has already been dealt with, and we have pointed out that the Judicial Committee appear to have answered that question in the negative. It has been said that it was unnecessary for the purposes of the case to go to that length, that the actual decision is limited to proceedings taken during the continuance of war, and that all the case decides is that the action of the courts is then suspended. If that be so the question is left open whether such actions will lie on the restoration of peace. But the reasons given for the report support the wider proposition; and, indeed, if it be once admitted that the courts have no power to interfere at the time, it seems to us to follow that the right is gone altogether. To suspend the law in

such circumstances is in general to annul it altogether. To refuse to interfere at any rate in the case of a prisoner condemned to death is not suspension of law but abrogation; it is not a postponement of justice but a denial of the only remedy. An action under Lord Campbell's Act may be a consolation to a widow, but it can afford no relief to her husband who has been executed. And the same reasoning applies in a less degree to all cases. The remote possibility of recovering damages at some subsequent date is not a substitute for the right, if there be a right, to protection of person and property, and not the less because the defendant must be a 'soldier, therefore seldom rich.' We cannot think that if a right to redress existed the courts could in such cases refuse the only effective remedy. That they cannot take action at the time, as is admittedly decided by the *Marais* case, seems to us to be consistent only with the hypothesis that there is no right to redress.

It is to be observed in this connexion that a remedy by legal action is not the only means of obtaining compensation. Governments can, and commonly do, make grants in aid of their subjects who have been injured by military operations, and this form of compensation is the more preferable because such grants are distributed among the sufferers irrespective of the cause of their losses. Persons who have suffered damage by reason of military operations admittedly justifiable have as great a moral claim to be indemnified as those who have been damaged by action which cannot be so justified. But if the law gave compensation, the latter class would, in the view suggested, alone be entitled to claim. In the same way legal process is not the only possible check on the action of the military; indeed that action can be more effectively controlled by the Government of the country than by the courts of law. The history of the present war furnishes instances of pressure brought to bear on the Government, and of the administration of martial law being modified in consequence of that pressure.

One further point remains to be noticed. It has been contended that the existence of war in the view of the law does not depend on the actual fact of whether war is raging in the country or not, but is to be determined by the fact of whether the courts continue to sit; an artificial rule which does not commend itself, apart from authority, to reason. The necessity for taking action which infringes on rights of property or liberty can not depend on the fact that the courts continue or do not continue to sit: it depends on the necessity created by the presence of an enemy in the country. The military indeed can at their will prevent or allow the continuance of the sittings of the courts. Are they to be in a worse

position because they allow them to carry on their business subject to the interference necessitated by military operations? The real test must be the necessity of the occasion, and as has already been pointed out, the courts are powerless to help the military to deal with that necessity. That there is some show of authority for the proposition cannot be denied, but when that authority is examined it will be found to be limited to the circumstances of each particular occasion, and to fall far short of the general proposition for which it is cited. The fount of this contention is the report of the speeches of lawyers in the debate on the Petition of Right, which will be found in 3 Rush. 76. But what were the circumstances there? This country was at war with France, but there had been no invasion of England and no state of war existed there. The speakers appealed to the fact that the ordinary business of the courts was continuing as evidence, that there was no necessity for superseding the ordinary law in the one function of martial law to which the Petition of Right referred, viz. the trial of offenders by military courts. There was no reason in the circumstances of that occasion why offenders should not be dealt with by the ordinary process, for in fact there was no war. Even if opinions expressed in debate in the Commons in those contentious times could be safely accepted as the sober judgment of the speakers, it seems certain that they had in their minds only the particular facts before them and did not intend to enunciate any principle of universal application. There have since that time been various reports of law officers containing dicta to a similar effect, but the same criticism holds good in regard to each of them; they refer only to the particular facts, in every case rebellion not war, before those giving the opinion, and there is no authority which lays down the general proposition, that in the view of the law, war does not exist when in fact it does exist. War is self-evident, and the fact that courts may continue to sit cannot prevent the existence of war.

H. Erle Richards.

THE CASE OF MARAIS.

THE decisions of the Judicial Committee of the Privy Council, though in form but expressions of the opinion of a committee summoned for the purpose of advising the King upon the matters submitted, are in effect judgments of the Supreme Court of Appeal from the Courts of the Indian Empire, and from those of all the colonial dominions of the Crown.

The importance therefore of ascertaining the meaning to be attached to, and the use to be made of, any decision of the Privy Council relating to any matter arising out of the operation of martial law as at present enforced in South Africa, is not limited to the particular occasion or to the particular place, but extends to the whole of the dominions of the Crown beyond the sea.

In addition to this the law of Great Britain and Ireland is undoubtedly affected by reason of the weight naturally and necessarily attributed in our Courts to the opinions enunciated by a legal tribunal of the highest authority and of the greatest learning.

In the case of *Marais*, in which the Privy Council refused to the petitioner (*Marais*) special leave to appeal from an order of the Supreme Court in Cape Town rejecting an application there made for his release from military custody, a result has been arrived at which will doubtless afford a precedent to be followed by subsequent committees of the Privy Council in cases where the facts are the same, or for all practical purposes the same. Though the language in which the judgment of the Committee is couched is the language of advice, and is upon the face of it merely for the information of the sovereign, yet the King exercises no personal opinion upon the matter, but acts, and is probably by the Constitution bound to act, upon the advice thus given him. No dissentient minority of the Privy Council is permitted to express in public its reasons for differing from the majority, nor is any report of a dissentient minority submitted to the King. This, in a case such as that of *Marais*, where what was said during the hearing of the petition by some members of the Committee may be thought to warrant a surmise that the Committee was divided in opinion, may perhaps be regretted by the jurist or by the student of martial law; but it must be admitted that if a minority judgment or report, contradicting the result arrived at by the majority, were permitted to be

presented to the King at the same time with the judgment of the majority, it would be difficult to require or expect that His Majesty should, in all cases, accept and act upon the view of the majority. On the contrary, to permit both views to be presented would appear to leave upon the Crown the ultimate responsibility in such cases of deciding between the opposing views presented, with the assistance only of the general principle, that in the ordinary course the view of the majority should prevail.

In the absence of the assistance which would have been derived from the publication of the view of the minority, if we are right in our assumption that there was a dissentient minority in *Marais'* case, it will be found useful to consider both the result arrived at by the Privy Council and the objections to the reasons assigned for arriving at that result.

It may be stated, by way of preface, that the reasons assigned do not have the same force or binding effect in future cases by way of precedent as has the actual result. The actual result, though not perhaps, by reason of the advisory position of the Committee, technically as binding as a decision of the House of Lords or of a court of law upon its successors, must practically be accepted and followed in all similar cases from whatever colony they come; whilst the principles enunciated or the reasons assigned would seem open to be reconsidered in cases where the circumstances are dissimilar, and where it can be shown that the supposed principles are in truth erroneous, or too wide, or the assigned reasons ill founded or contrary to justice.

In the House of Lords itself, even, the above would seem to be taken as the general effect of its judgments as precedents[1], and may, it is thought, *a fortiori* be regarded as the maximum of force as precedent to be attributed to a decision of the Privy Council. Such a decision is nevertheless of considerable public importance at the present time, and likely to be relied upon at various periods hereafter.

In South Africa application was made on behalf of Mr. Marais, a civilian subject of the Crown, for his immediate release from military custody, upon the ground that his arrest and imprisonment were in violation of the fundamental liberties to which subjects of His Majesty are entitled. His application came in the first instance before Buchanan and Jones JJ., who had, amongst other things, before them an affidavit by the officer commanding in the Cape Colony district, to the effect that he had made inquiries and found that there was a prima facie case against

[1] In *Quinn* v. *Leathem* [1901] A. C. at p. 506, the Lord Chancellor is reported as saying 'a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it.'

the prisoner (*Marais*), that there were military reasons for keeping him in custody, and that he would shortly be put on his trial, though owing to military exigencies he was not prepared at present to state what charges would be preferred against him. Upon this, the judges order a return to be made by the gaoler in whose custody the applicant is, showing by what authority he detained the applicant, and direct that the Attorney-General should have notice of the proceedings.

Here, then, we see the Court making some inquiry and having some slight evidence of military necessity for the action taken by the military authorities.

Then the matter comes on before Mr. Justice Buchanan alone. He, in addition to the above, has then before him an affidavit setting forth in general terms the charge made against the petitioner, and upon these materials the petitioner's application for an order for his release from military custody is refused.

Mr. Justice Buchanan in refusing the application may in truth have fully considered all the above matters, but upon the statement of the petition, which was alone before the Committee of the Privy Council, he would appear to have relied for his decision upon the view that the Court ought not to go into the question of the propriety of or necessity for the proclamation of martial law, and to have held that the mere fact of the proclamation precluded the Court from inquiry into the action of the military authorities in regard to Mr. Marais.

Thus stated, it seems difficult to reconcile the grounds of his decision with what has previously been considered to be the law, though, as we shall see, the result arrived at by him would seem upon other grounds capable of being supported. The proclamation of martial law does not *per se* justify the application of martial law. In times of war or warlike disturbance it is right and proper that before martial law is put in force a proclamation to that effect should be promulgated, but it is not the proclamation which creates the martial law or justifies it. The proclamation is rather the statement or notice of the existence of a state of facts than the creation of those facts (see the opinion of Campbell and Rolfe in Forsyth on Constitutional Law, p. 198; ibid., note, p. 180; the Report in the Ceylon Commission, Q. 5459).

Martial law arises from the State necessity, and is justified at the common law by necessity, and by necessity alone—a necessity which the Courts may at any time inquire into, so far at any rate as they reasonably can without injury to the State arising from the disclosure of matters contrary to the public interest and endangering the public safety. But at the same time it may

perhaps be, that a Court is not bound to inquire in cases where the inquiry would bring it into conflict with the military power, and so lead to the suppression of the Court by force, and thus entail upon all citizens the loss of a tribunal for the adjustment of ordinary disputes and for the administration of the ordinary justice. Nor can it conveniently be held that a Court is bound to inquire where the military power is both able and determined to resist its conclusion, if hostile to military views, by force.

Consequently in the *Marais* case the result arrived at by Mr. Justice Buchanan may be supported upon the ground that so far as inquiry was practically possible without public injury, inquiry was in fact made; and that further investigation or action was from the circumstances impossible. In other words, that any further action on the part of the Court was rendered impossible by superior force, and that there was some evidence to justify what had been done by the military authorities as being necessary for the public safety.

The argument that, because for some purposes the Courts are permitted to sit and perform their functions they must be permitted by the military authorities to perform all functions, even those injurious to public safety, seems hardly to appeal to modern ideas. That view would seem to impose unnecessarily upon the military power the duty of closing courts of law in time of war, lest by remaining open they should take upon themselves inquiries fatal to the due prosecution of the war or injurious to the public safety.

The decision therefore of the Cape Court would upon the facts seem well founded, though the reasons given may well be said to be open to grave doubt, if they were fully and correctly stated by the petitioner.

Under the above circumstances the matter came before the Privy Council, who had primarily to consider the actual decision arrived at, and only as a secondary or subsidiary matter to deal with the reasons assigned. Can it be reasonably contended that a right result is vitiated by reasoning in itself wrong?

We would submit not, unless indeed it appeared that a contrary result might properly have been arrived at from a consideration of matters not considered by the Court below.

When the petition came before the Privy Council the chief argument, indeed the only argument really relied on, was that there was a fixed principle that, if the ordinary Courts were open, civilians must be dealt with by them if charged with offences, and not by military persons or tribunals; that a place where the Courts are open must be regarded as a place in which there is peace, and that when the Courts are open it is 'time of peace' for all legal purposes and in all courts of law.

This contention is undoubtedly supported by a considerable show of authority, and would appear in more ancient times to have been generally held a true statement of the law.

It was clearly the view adopted by all members who spoke upon the debates in the House of Commons in the time of Charles I upon the Petition of Right. It was not merely the view of the framers of the petition. Both parties accepted it as a truism. It was then regarded as a legal axiom, and from that fact probably it owes its existence in more modern text-books as a correct statement of the law.

It must be remembered that at that period justice was to a great extent administered by the aid of legal fictions, and there was to the then legal mind nothing revolting in the assumption of facts which were opposed to actual knowledge. The application of a general rule to exceptional facts not within the true scope of the rule seemed, at that date, a legal necessity rather than a mischievous injustice.

General formulae and fictitious averments were machinery in common use in the Courts. At the present day the fictions have vanished, and every effort is now made to avoid applying a hard and fast general rule to any case in which its application would work a manifest injustice.

Further it may be fairly considered that the area now affected by a war, the area over which martial law is a necessity, and, because of that necessity, lawful or excusable, is much larger, much more extended, than was the case prior to the increased facilities afforded for locomotion by railways and other improved modes of travel, and prior to the improved modes of transmitting information and orders by telegraph and the like. So that whilst in primitive times the area of disturbance was little more than the locality occupied by the rival encampments of the two bodies in conflict, in which area no Court could or would be found to sit for any purpose, in modern times it extends to long distances and comprises a large, it may be a vast, area.

It was not to be expected that a Committee of the Privy Council should feel bound by any such general rule to the extent of being compelled to hold, contrary to actual fact, that war did not exist, simply because where the war in fact existed the Courts were sitting.

Upon that point, at any rate, the judgment given seems to have commanded the general approval of those most qualified to judge.

It distinctly puts an end to the ancient rule, that because for some purposes the Courts are open at a place, that place must be held to be one where peace exists, no matter what the actual fact may be.

The decision of the Privy Council, that Mr. Marais should not

have special leave to appeal from the Cape Court, was announced at the conclusion of the arguments, and at the same time it was stated that the reasons would be given at a later date.

If the result commands general acquiescence or approval, it cannot be said that the whole of the reasoning afterwards put forward as that on which the result was founded has met with the same satisfactory reception. Propositions are therein stated in general terms which, so stated, can hardly be reconciled with what has hitherto been supposed to be the law. It may of course be that in thus stating them it was assumed the reader or hearer would himself perceive the propositions were intended to be limited to the particular circumstances of the case then dealt with. If so, it may be respectfully regretted that this was not made clear.

The first proposition is, 'that where actual war is raging, acts done by the military authorities are not justiciable by the ordinary tribunals.'

The second proposition, which, as we have seen, owing to the way in which the case was put before the Committee, was that upon which the Committee seem to have been invited to decide the fate of the application, is, that 'the fact that for some purposes some tribunals have been permitted to pursue their ordinary course is not conclusive that war is not raging.'

The third proposition is that 'the framers of the Petition of Right knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure.'

The second of these propositions has already been considered, and may, it would seem, be accepted at the present day as a sound statement of the law.

The other two propositions may perhaps be regarded as not necessary in order to justify the actual result, but in any case they appear open to some criticism.

The first of them is expressed in wide terms, but was probably intended to be taken as limited to the actual facts of the case, to ordinary tribunals sitting in time of war, and to acts such as were complained of by Marais. Thus limited, it might probably not be open to serious criticism. But if it is intended thereby to affirm that military authorities cannot in any case when the war is ended be sued for acts of violence inflicted upon citizens during war, or done to their property whilst hostilities are raging, then it is a proposition at variance with what has long been, and what is still believed to be, the law. Apart from the protection afforded by Acts of Indemnity usual in such cases, the military authorities can be sued in the Courts for such acts, and are legally liable therefor unless they can prove that they were necessary acts, acts necessary,

that is, for the public defence or for the proper prosecution of the war. The only defence for them is their necessity, the proclamation of martial law is not *per se* a defence, though it may be a circumstance to be considered. The proclamation is not to be taken as proving of itself the necessity.

Acts of war done against an alien enemy stand of course upon a different ground; with them we are not now concerned.

It is submitted, in short, that proof of actual war does not exempt the soldier from all liability to answer after the war for all acts done during war.

Again, even the limited proposition that 'the authorities are not responsible to the Courts sitting during the war' would appear too wide. It would seem to depend upon the question of whether the Courts are able to sit for all purposes, and are allowed by the military power to do so, and upon whether the matter is one they can, without danger to public safety and the proper prosecution of the war, investigate and deal with.

The third proposition cannot be taken to mean that the framers of the Petition of Right expressly made the Petition of Right applicable only to commissions for the execution of martial law issued by the Crown in time of peace, because no such limitation is expressed in that document. That document forbids the issue of all such commissions, that is commissions issued by the Crown for trying soldiers and civilians by military or martial law.

The time at which it was passed, though regarded as a time of peace, because the Courts were open, by the lawyers of that period, was a time when our country was to a large extent ill affected to the King, and when the King was about to bring in foreign troops to support his authority, and when French ships of war were hovering about our coasts and a war with France was actually in progress. It was indeed urged on behalf of the Crown, though not by a member of the House itself, that it was a time of hostility with a royal army in the field (see Parl. Hist., vol. viii. p. 59).

The whole object of the petition was to prevent the Crown from having the power by proclamation to deal with subjects at any time by other means than by the ordinary Courts, and to prevent disturbances or hostilities being made at the will of the King a reason for the issue of commissions such as had been issued.

If by the third proposition it is meant that the debates show that those who favoured or framed the petition only intended that it should forbid the issue of commissions in time of peace, then it may be said that the petition cannot be restricted by arguments used in the course of the debates which led to its enactment, that it speaks for itself.

It has never been permitted in our Courts to refer to the arguments advanced in the debates upon a Bill which afterwards becomes, with or without amendments or modifications, an Act of Parliament, for the purpose of aiding the Court to construe the statute itself, still less could such reference be permitted for the purpose of governing or limiting the words of the statute. It has been permitted to cite the report of a Parliamentary Committee, where the statute to be construed was the outcome of and based upon the report, in order to show what the subject-matter intended by Parliament to be dealt with was. And on one or two occasions the speech of the introducer of a Bill has been referred to in the Courts in order to assist in ascertaining the subject-matter and purpose of the Act. Beyond this, reference to what has been said in Parliament upon or during the progress of the Bill has not been allowed in the Courts upon questions arising as to the meaning of an Act or as to its purpose or object.

If however, which is perhaps hardly to be supposed, it was intended by the Committee to decide that the arguments used in debate by the supporters of a Bill may be afterwards made use of to construe, or to explain, or interpret the Act into which the Bill is eventually turned, then it becomes material to consider what the substance of the arguments used in support of the Petition of Right was, and how the arguments are vouched for.

The report of the most important discussion directly relevant to the question of the obnoxious commissions for the execution of martial law 'as is used in armies in time of war' is to be found in Rushworth's Collections, vol. ii, Appendix, p. 76. The writer (Rushworth) had previously published a report of the debates on the Petition of Right and had therein made no mention of the speeches in question, which he reports in an Appendix. In so reporting them he explains that he had at one time lost his notes of the debate, and so omitted these speeches from their proper place. Accepting the explanation, and taking it that he noted at the time all that seemed to him of importance, and that in writing out and enlarging his note afterwards, when he found it again, his discretion and recollection are absolutely to be trusted, the value of the condensed speeches thus given as an aid in the proper construction of the Petition of Right would seem very uncertain. When studied with care it will be found they echo, or are based upon, the then accepted legal axiom that 'time of open Courts' and 'time of peace' are synonymous in law, whilst 'time when Courts are closed' is equivalent to 'time of war'; and that what they mean by martial law is that law which is used to control armies in the field. And further it will be found that the speakers seem care-

fully to avoid saying anything which can give countenance to the suggestion that they accept the right of the Crown to issue commissions of martial law in time of war dealing with citizens who are not in arms nor forming part of the forces in the field. That they emphasize and mainly insist on the position, that in time of peace, in time of open Courts the commissions are inexcusable is no doubt true, but it is equally true that throughout the proceedings they, for the sake of appearances, protest the greatest trust in the King and express their gratitude for his gracious promises, when from their actions it is plain they absolutely mistrust the King and place but little reliance on his word. The primary objects of their action are to prevent the King from trying his rebellious or suspected subjects by these obnoxious military commissions at his will, and to render it impossible for him to quarter foreign soldiers on English citizens. With these objects in view they press on the petition under which he is no longer to be able on a pretext of rebellion or disturbance or on any other ground to issue 'such commissions.'

To sum up the argument upon this point, the debates ought not, we submit, to be taken to interpret or control the language of the Petition of Right; but, if contrary to our view they ought to be taken for that purpose, then the result, not of the framers' views alone but of the views of the whole of the members who took part in the debate, will, if examined, be found to be that commissions of martial law to try citizens are illegal, if the Courts are open—a result which it will be seen would be destructive even of the second proposition of the judgment and inconsistent with the refusal of leave to appeal.

Such, then, seem to be the grounds for criticizing the reasons assigned by the Committee—grounds, it is submitted, sufficient to entitle subsequent litigants to desire the further consideration of the matters in question, before the whole of the propositions are accepted absolutely and without limit, and made applicable to all those cases to which in terms they are capable of application.

CYRIL DODD.

WHAT IS MARTIAL LAW?

[The following observations are reprinted by the consent of the editor of the *Times*, with some little alteration and addition, from a letter published there on March 10.]

I.

IT may be taken as undisputed that the 'martial law' of the earlier books, down to the end of the seventeenth century, if not later, is what we now call military law, the rules for the governance of armies in the field and other persons within their lines or included in the region of their active operations. It has never been denied that the Crown—that is, in fact, the military commanding officer—can enforce military discipline and the laws of war when the King's troops are engaged in a foreign campaign, or that the Crown can make rules for that purpose without need of any statutory authority. Any such rules, so far as applicable to persons not British subjects, whether friends or enemies, ought of course to be consistent with the law of nations and with the recognized usages of war. But this does not concern us just now. The written law of the Mutiny Act and the King's Regulations was introduced to provide for discipline in time of peace at home; but in modern practice it is found sufficient in war, and is treated as being the whole internal law of the British army both at home and on active service. It is difficult to imagine any case in which it would be necessary to deal under military law proper with a British subject (or person owing temporary allegiance) who was neither a person bound by the provisions of the Army Act nor a rebel. If such a case could occur it might perhaps be necessary to rely on the general prerogative of the Crown in time of war.

On the other hand, it has been settled ever since the Petition of Right that the Crown has no power by the common law to administer military law within the realm in time of peace. Indeed, Sir Thomas Smith—no anti-royalist, but Queen Elizabeth's Ambassador and Secretary of State—was of that opinion as early as 1565, when he wrote 'The Commonwealth of England,' in a passage which seems to have escaped recent writers:—

'In war time and in the field the Prince hath also absolute power, so that his word is a law. He may put to death, or to other bodily punishment, whom he shall think so to deserve, without process of law or form of judgment. This hath been sometime used within the realm before any open war, in sudden insurrections

and rebellions, but that not allowed of wise and grave men, who in that their judgment had consideration of the consequence and example, as much as of the present necessity, especially when by any means the punishment might have been done by order of law. This absolute power is called Martial Law, and ever was, and necessarily must be, used in all camps and hosts of men, where the time nor place do suffer the tarriance of pleading and process, be it never so short, and the important [*quaere*, importunate] necessity requireth speedy execution, that with more awe the soldier might be kept in more strait obedience, without which never captain can do anything vailable in the wars[1].'

This is exactly the law laid down in the Petition of Right two generations later, save that in the Petition of Right nothing is in express terms either affirmed or denied as to what the King may do in time of war.

II.

Military law is a special body of rules applicable to special classes of persons. It has nothing to do with the general right of citizens to defend their own persons and property, or the right—which is also a duty—to preserve the peace against rioters, by the use of whatever force is reasonably necessary. Here there is no question of any special prerogative of the Crown, though the duty of lawful men in such case is generally best performed by assisting some responsible officer[2].

Now it seems that on principle there must be an analogous right and duty of defending the Commonwealth against the King's enemies whenever and wherever there is a state of war within the realm, and of doing, as incident to such defence, various acts which otherwise would be trespasses. The same law must apply to any other distinct jurisdiction in the King's dominions where the constitutional rules of the common law prevail. I do not know in fact of any jurisdiction under the British flag where these rules are not assumed to have become part of the local law, subject to any special local legislation.

Three things are pretty clear about this power or duty, assuming it to exist. First, it is not a matter of prerogative, but appertains to all lawful men. Secondly, it is not specially vested in military officers, though they may often be the most proper persons to exercise it. Thirdly, its exercise requires to be justified on every occasion by the necessity of the case. I conceive that if the necessity be disputed it must be determined, after the restoration of peace, by the ordinary courts of justice, as the normal and only

[1] Commonwealth of England, bk. II, c. iv (3 in ed. pr.). I modernize the spelling. A Latin translation published at Leyden renders martial law by *potestas castrensis*.

[2] It is sufficient to refer to the leading case of *R.* v. *Pinney*, 1832, 3 St. Tr., N. S. 11, 3 B. & Ad. 947, 37 R. R. 599, and preface.

possible authority for deciding questions of justification at common law; and that, as in every common law justification, the burden of proof is on the person justifying. Acts of this kind cannot be justified *a priori*, as matter of law, by any executive order such as a proclamation of martial law, save so far as special authority may have been conferred by legislation. Proclamation of martial law does show that the responsible executive officers of the King thought a state of war existed, and accordingly it is evidence, and may be strong evidence, though subject to be rebutted, that a state of war did exist. But perhaps the existence of a state of war within the jurisdiction is, as suggested in the *Marais* case, a public fact of which the Court may take judicial notice. The Court being satisfied that there was, at the time in question, a state of war, justification of extraordinary acts done in public defence becomes possible. Whether the justification is made out in any particular case must be tried, if necessary, like any other disputed question. It would be too long to consider here the form in which it should be put to a jury, but the view to which I incline is that the existence of reasonable and probable cause for the act complained of, having regard to the public danger, is necessary and sufficient to justify it. Juries are not likely to take an unduly narrow view of what a man may reasonably do in the public interest on such an occasion; and it is settled law that a man acting under the stress of imminent danger is not expected to show consummate prudence[1]. On the other hand, any abuse of the public need for ends of private malice ought to be, and no doubt would be, severely dealt with.

Two further practical questions of a general kind immediately suggest themselves. First, what is a state of war? Must there be, then and there, actual fighting or disorder? Must life and property be in imminent danger? Must the enemy be visible in force, or the sound of his guns audible? Then, are the kinds of acts which may be necessary for public defence limited to the use of physical force against persons, by way of restraint or summary punishment? If not, what other kinds of acts may be required and justified?

The old books help us but little on these points. There was certainly a prevalent opinion in the seventeenth century that it was time of peace when and where the courts were open and the King's writ could be executed. This might be a very fair test in the reign of James I[2]. The presence of the King's enemies at York

[1] See *The Tasmania*, 1890, 15 App. Ca. 223, 226; *Jones* v. *Boyce*, 1816, 1 Stark. 493, 18 R. R. 812.

[2] It seems to have been laid down with reference to the question whether there was a state of war such as to prevent or suspend the acquisition of civil rights, see Co. Lit. 249 *b*.

might well seem no cause whatever for holding that there was a state of war at Plymouth or even at Westminster. There is also some authority to show that not only acts done against enemies or disaffected persons, but invasions of innocent persons' property, may be justified by the necessity of war. 'In time of war one shall justify entry on another's land to make a bulwark in defence of the King and the kingdom' (Y. B. 21 Hen. VII, 27, pl. 5, per Kingsmill J.). Here, of course, war means only war within the realm. The dictum is notable as showing that other things besides the direct use of force against force may be—as the judge continues—'justifiable and lawful for the maintenance of the Commonwealth[1].'

III.

Next, consider the application of the principles to modern conditions. An enemy's army has landed in force in the north and is marching on York. The peace is kept in London and Bristol, and the courts are not closed. It is known that evil-disposed persons have agreed to land at several ports for the purpose of joining the enemy and giving him valuable aid and information. Bristol is one of the suspected ports. What shall the Lord Mayor of Bristol do? I submit that it is his plain moral duty as a good citizen (putting aside for a moment the question of strict law) to prevent suspected persons from landing, or to arrest and detain them if found on shore, to assume control of the railway traffic and forbid undesirable passengers to proceed northward, and to exercise a strict censorship and inquisitorial power over letters and telegrams. All these things are in themselves trespasses (except, probably, forbidding an alien to land); some of them may perhaps be justifiable under the statutory powers of the Postmaster-General, but summary restraint by way of prevention must be justified by a common law power arising from necessity, if at all. Observe that I say nothing for the present about trial or punishment. The popular (and sometimes official) notion that martial law necessarily means trial by Court-martial has caused much confusion. Summary punishment may or may not be necessary. In that respect the Mayor's authority would be like that of the master of a ship.

Now, if the Lord Mayor of Bristol fails to do these things, he will surely find himself in as much trouble as his predecessor in the time of the Bristol riots. And I do not think he will improve his defence by pleading that the peace was still kept in Bristol and the courts were open, and therefore he thought he had no power to do anything beyond the ordinary process of law. Nor yet will

[1] It is supported by a series of dicta coming down as late as 1792. See Dyer 36 *b*, and per Buller J. in *British Cast Plate Manufacturers* v. *Meredith*, 4 T. R. at p. 797.

he mend matters if he says that he was waiting for an Order in Council which was never issued, or never came to his knowledge. At best it will be a topic of slight mitigation. For an Order in Council, though it might be useful as evidence that the person acting under it was acting reasonably and in good faith, could not of itself make anything lawful which was not so before; nor, conversely, could any accident or default in higher places derogate from the power and duty of the magistrate on the spot. At one time it was a rather favoured doctrine that extraordinary but necessary acts in time of war or rebellion, outside military law proper, are all in the first instance illegal, and that it may be a political duty to commit unlawful acts and rely on the Legislature's grace for a subsequent Act of Indemnity. But this, it is submitted, imputes gratuitous folly to the common law, which cannot be so perverse as to require a man in an office of trust to choose between breaking the law and being an incompetent officer and a bad citizen. In the absence of positive authority we are entitled, and indeed bound, to suppose the law to be reasonable. It seems, therefore, that the acts which every courageous and prudent magistrate would certainly do in the circumstances supposed are not a kind of splendid offence, but are (in the words of Justice Kingsmill) 'justifiable and lawful for the maintenance of the Commonwealth.' It also seems that the range of those acts must extend to the prevention of aid and comfort to the enemy beyond the bounds of places where warlike operations are in sight. In many places there may outwardly be peace, and yet modern means of communication may admit of important aid being conveyed to the enemy in the shape of information, supplies, and personal adherents. In this manner the effective radius of a state of war has been multiplied tenfold or more. By recognizing this fact we do not alter the law, but apply it to the facts as they exist; nor do we disparage the wisdom of our predecessors who declared their opinion of the law in a form appropriate to the facts as known to them.

IV.

The results which are accordingly submitted are shortly these.

So-called 'martial law,' as distinct from military law, is an unlucky name for the justification by the common law of acts done by necessity for the defence of the Commonwealth when there is war within the realm. Such acts are not necessarily acts of personal force or constraint. They may be preventive as well as punitive.

The justification of any particular act done in a state of war is ultimately examinable in the ordinary courts, and the prior question

whether there was a state of war at a given time and place is a question of fact [1].

There may be a state of war at any place where aid and comfort can be effectually given to the enemy, having regard to the modern conditions of warfare and means of communication.

It may be objected that, if the view now propounded is correct, Acts of Indemnity are superfluous. But this is not so. An Act of Indemnity is a measure of prudence and grace. Its office is not to justify unlawful acts *ex post facto*, but to quiet doubts, to prevent vexatious and fruitless litigation, and, quite possibly, to provide compensation for innocent persons in respect of damage inevitably caused by justifiable acts which would not have supported a legal claim.

If any one suggests a danger of this doctrine of necessity being extended without limit, the answer—almost too elementary to call for statement—is that courts of justice must conclusively presume the ordinary process and remedies of law to be sufficient in time of peace.

V.

As to *ex parte D. F. Marais* [2], the only point it really decided, in my opinion, was that the absence of visible disorder and the continued sitting of the courts are not conclusive evidence of a state of peace. This, I venture to think, is right, for reasons already indicated. Mr. Marais had applied to the local Court for summary release, on the ground that there was no state of war at all at the time and place, and therefore no possible justification for an arrest otherwise than in ordinary course of law. The only reason assigned by his counsel for denying that there was a state of war was that the courts were open. What was, in fact, the justification for arresting Mr. Marais in particular may be judicially considered hereafter without any kind of prejudice, so far as I can see, if Mr. Marais should be advised to bring an action. That question was certainly not before the Judicial Committee.

The judgment involves the further position that neither an application for summary release from extraordinary arrest nor an action for anything done as an extraordinary act of necessity will be entertained by the ordinary Courts during the continuance of a state of war in the jurisdiction, when the Court is satisfied that a responsible officer acting in good faith is prepared to justify the act complained of. I do not know that this is seriously objected to.

The adjective 'military' is used several times in the judgment.

[1] *Quaere* as to judicial notice being taken of a state of war within the jurisdiction, and cp. Co. Lit. 249 *b*.

[2] [1902] A. C. 109.

I am inclined to regret this as being likely to keep alive the fallacious notion that the so-called 'martial law' justified by necessity is identical or logically connected with military law. I pass over various more or less speculative questions of various degrees of interest which are suggested by extra-judicial remarks in the course of the judgment. It should be remembered that, whatever *ex parte D. F. Marais* decides, be it what I suppose, or more or less, the decision is not binding on any English Court, and probably not binding on the Judicial Committee itself[1] on any future occasion.

FREDERICK POLLOCK.

NOTE. Having regard to the points of agreement and difference between Mr. Erle Richards and myself, it may be well to mention that we wrote in complete independence and ignorance of each other's work. Since we have been in communication each of us has added something to make his own position clearer. We agree that (1) there may be a purely common-law justification for acts, being otherwise trespasses, done in time of war within the realm on the ground of necessary public defence, and (2) the person justifying such an act must show that he acted in good faith. Mr. Richards thinks that good faith is sufficient as well as necessary to make out the justification. I should add that (3) there must be reasonable and probable cause according to the apparent urgency. Since orders from an apparently competent military officer or magistrate would be evidence not only of good faith but of reasonable and probable cause, and on the other hand want of reasonable and probable cause (as if an unskilled civilian entered and dug in my land to make an earthwork without military orders or advice) would be strong evidence of want of good faith, the difference between our views is perhaps not very great for any practical purpose. The two extreme views, (*a*) that a proclamation of 'martial law' by the authority of the Crown excludes all ordinary jurisdiction, and (*b*) that there is no justification at all except under an Act of indemnity, appear to me equally untenable.—F. P.

[1] *Ridsdale* v. *Clifton*, 2 P. D. at pp. 306, 307.

FARQUHARSON v. KING [1].

IMPORTERS left their goods with a dock-company, and as sales were made gave delivery-orders to the purchasers. Their clerk, having express authority to sign these delivery-orders, executed one in favour of a fictitious person, and the dock-company acting upon it transferred the goods in accordance with the order. Afterwards the clerk sold the goods (using the fictitious name) to an innocent purchaser and pocketed the money. Who is to lose—the importers or the purchaser? The opinion of a majority of the Court of Appeal was in favour of the purchaser, and with that decision the present writer (if he may be permitted to say so) is inclined to agree. It is for the purpose of making some suggestions as to the reasons given for the opinion of the Court that he writes.

A. L. Smith M.R. proceeded upon the *Lickbarrow* v. *Mason* rule:—

'Where one of two innocent persons may suffer by the acts of a third person, he who has enabled such third person to occasion the loss must sustain it [2]';

with this qualification, however, that

'the act which has enabled the third person to occasion the loss must . . . be connected with the fraud which has caused injury to one of those two persons, in the sense of bringing about the fraud.'

Vaughan Williams L.J. agreed in the result, but said—

'It is impossible, in the face of the authorities, to say that "whenever one of two innocent persons [3]," ' &c. 'The conclusion I have come to is that one of two innocent parties ought never to be said to have within the meaning of the rule enabled a third person to commit a fraud, unless the act he has done is an act intended to be acted upon by somebody [4].'

'In my opinion the sale to the defendants (the purchaser) was a dealing with the timber in pursuance of the power, although not

[1] [1901] 2 K.B. 697; 70 L.J. K.B. 985. [2] 2 T.R. 63, 70, 1 R.R. 425.

[3] This had already been observed: see per Coleridge C.J. in *Arnold* v. *Cheque Bank*, 1876, 1 C.P.D. 587; 45 L.J.C.P. 562; and per Lord Field in *Bank of England* v. *Vagliano* [1891] A.C. at p. 169; 60 L.J.Q.B. 177.

[4] The learned judge might have cited in support of this view the language of Wills J.: 'The foundation, however, of the whole thing is that the agent should be authorized to enter some transaction' (*Biggs* v. *Evans* [1894] 1 Q.B. 89). That learned judge, however, did not (as is submitted) sufficiently distinguish between ostensible ownership and ostensible agency, nor between the different sorts of ostensible agency. See post, and also Ewart on Estoppel, 484 f.

in pursuance of the authority, and I think that that consideration is sufficient to bring the case within the principle in *Lickbarrow* v. *Mason.*'

Both judgments proceed upon the well-known *Lickbarrow* v. *Mason* rule, but each proposes a different qualification of it.

Bearing in mind the distinction between ostensible ownership and ostensible agency as a ground of estoppel of the true owner, the significance of the suggestion of Vaughan Williams L.J. (to take his first) is that the true owner will be estopped only in cases in which, having enabled the person who committed the fraud (let us call him the rascal) to appear as owner or agent, he did so *with the intention that someone should act upon that appearance.* To test this let us examine its application to ostensible agency and ostensible ownership separately.

Ostensible Agency.

Ostensible agency may, for the sake of exposition at least, be divided into two kinds: (1) appearance of agency, when there is no agency at all; and (2) appearance of greater authority in an agent than that which he really has—in other words, there may be a misleading appearance as to (1) the existence of agency, and (2) the extent of agency [1].

Extent of agency. Very many of the cases of estoppel by ostensible agency fall within this latter subdivision. The circumstances are that between the true owner and the rascal there is some relation of principal and agent; that the rascal has exceeded his authority, and that the principal is estopped because he has enabled the rascal to appear to have authority to do the act in question. For example, a mercantile agent is given documentary power to draw upon his principals, whereas his instructions and his real authority are to draw only as against any advances which he may make in respect of purchases for his principals [2]; or an agent has power to sell goods, and is told to sell only to persons who are 'responsible and in first class credit [3]'; or an agent is given power to purchase vegetables, and is told to select those only which are ripe [4]; or a bank-teller is given power to certify cheques, and is told not to certify when there are no funds [5]. In this class of cases Vaughan Williams L.J. would say that the reason for estoppel is that the principal intended *somebody* to act upon the power, and therefore he ought to suffer; but we should

[1] Ewart on Estoppel, 483-7.
[2] *Montaignac* v. *Shitta*, 1890, 15 App. Cas 357, 362.
[3] *Merrimac* v. *Illinois*, 1888, 30 Ill. App. 268; 21 N. E. Rep. 787.
[4] *Baker* v. *Barnett*, 1897, 113 Mich. 533; 71 N. W. Rep. 866.
[5] *Bank of Batavia* v. *New York Railway*, 1887, 106 N. Y. 199.

much prefer to adopt the view of an American judge in a case[1] which was approved in the Privy Council[2]:—

'It is a settled doctrine of the law of agency in this State, that where a principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice.'

We would say with Lord Herschell, in another case, that if an agent has power to borrow (for example) upon the happening of some extrinsic event—

'their lordships do not think it was incumbent upon the lender to inquire whether in the particular case the emergency had arisen or not[3].'

In this particular class of case, then, it is true that the principal did intend *somebody* to act upon the power given to the agent, and the act done is, as Vaughan Williams L.J. tersely puts it, 'in pursuance of the power although not in pursuance of the authority.' But it by no means follows that because in this particular class of cases the owner did intend that somebody should act and was estopped, therefore an owner will not be estopped in other cases in which he had no such intention.

He is estopped here because the act which his agent did appeared to be within his authority. The distinction is useful, but not clearly attended to, between estoppel of a principal (*A*) when the agent acts within what appears to be his authority, and (*B*) when the agent appears to be acting within his authority. There may be appearance as to the extent of the real authority (*A*), or appearance as to the act being within the authority (*B*)—appearance in relation to the authority (*A*), or appearance in relation to the act (*B*). In the class of cases in hand the appearance is as to the act (*B*), namely that it was within the power, and for that reason there is estoppel[4].

Existence of Agency. Let us turn now to cases in which there is no agency at all—in which the act done by the rascal is within

[1] *Bank of Batavia* v. *New York Railway*, 1887, 107 N. Y. 199. Other examples may be found in *Attwood* v. *Munnings*, 1827, 7 B. & C. 278; 1 Man. & Ry. 66; 31 R. R. 194; *Alexander* v. *McKenzie*, 1848, 6 C. B. 766; 18 L. J. C. P. 94; *Bryant* v. *La Banque du Peuple* [1893] A. C. 180; 62 L. J. P. C. 73; *Jarmain* v. *Hooper*, 1843, 6 M. & G. 850; 13 L. J. C. P. 66; *Barwick* v. *English Joint Stock Bank*, 1867, L. R. 2 Ex. 266; 36 L. J. Ex. 147. See also *Shaw* v. *Port Philip*, 1884, 13 Q. B. D. 103; 53 L. J. Q. B. 369.

[2] *Bryant* v. *La Banque du Peuple* [1893] A. C. 180; 62 L. J. P. C. 73.

[3] *Montaignac* v. *Shitta*, 1890, 15 App. Cas. 362.

[4] Ewart on Estoppel, 501 *f.*

neither power nor authority; in which the appearance is as to the authority (*A*) and not as to the act (*B*). For example, I send my horse to a sales-stable, upon the express understanding that he is not to be sold, but is there merely for the purpose of getting the benefit of the services of the veterinary; and the stable-proprietor fraudulently sells the horse. In such a case I by no means intend that any one should act upon the appearance of authority to sell. I intend the exact contrary of that. Nevertheless Lord Ellenborough would say:—

'If a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be assumed that the apparent authority is the real authority.' 'If the principal send his commodity to a place where it is the ordinary business of the person to whom it is consigned to sell, it must be intended that the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe[1]':

and one may be permitted to think that Vaughan Williams L.J., were the case put to him, would concur in such language, although it is subversive of his recent dictum. It must be observed too that the case just suggested is but one of very many instances which fall within the firmly established principle of *Cole* v. *North-Western Bank*[2]:

'If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded . . . from denying that he had given such authority.'

Nothing turns, it will be observed, upon whether the owner intended or did not intend that somebody should act upon what he had done. If indeed he dressed up the rascal as his agent, intending that people should be deceived, there can be no doubt that he would rightly suffer; the only question in such case would be whether we should have to go to estoppel at all for a reason for so holding—the law of agency probably sufficing. And if he dressed up the rascal intending that nobody should be deceived, but finds that good (or bad) use has been made of the clothes, should not he suffer rather than the innocent dupe?

[1] *Pickering* v. *Busk*, 1812, 15 East, at p. 43; 13 R. R. 366. This language has been very frequently indorsed in America: *Lausatt* v. *Lippincott*, 1821, 6 Serg. & R. 392; *Towle* v. *Leavitt*, 1851, 23 N. H. 358; *Taylor* v. *Pope*, 1868, 45 Cold. (Tenn.), 416; *Quinn* v. *Davis*, 1875, 78 Pa. St. 15; *Spooner* v. *Cummings*, 1890, 151 Mass. 313; 23 N. E. Rep. 839; *Lewenberg* v. *Hays*, 1897, 91 Me. 499; 39 Atl. Rep. 469; *Atlanta* v. *Hunt*, 1897, 100 Tenn. 84; 49 S. W. Rep. 483; *Heath* v. *Stoddart*, 1898, 91 Me. 499; 40 Atl. Rep. 547; *Van Duzen* v. *Jungleblut*, 1897, 77 N. W. Rep. 770 (Minn.).

[2] 1875, L. R. 10 C. P. 362; 44 L. J. C. P. 236.

Ostensible Ownership.

And the result is the same where the permitted appearance is that of ownership, rather than of agency. For example, 'If a wine merchant be left in possession of wine,' Bramwell L.J. would say that

'the fair inference is that it is his own, and a person may be justified in advancing money upon the security of it[1].'

The principle is the same as that applied in another case by Lord Herschell:—

'If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it, and who received it in good faith and for value[2].'

Here again it is quite immaterial whether the true owner intended somebody to act upon what he has done. Indeed were it necessary to go so far, it could be shown that estoppel may attach not only where there was no intention that any one should change his position because of the act done, but also where there was no intention to do the act itself:—

'The rule is that if a man so conduct himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on the inference, he shall be afterwards estopped from denying it[3].'

'It is a familiar rule that if the owner, although induced thereto by fraud, invests another with the apparent legal title to chattels, in pursuance of a contract, the person so clothed may transfer an unimpeachable title to a good faith purchaser[4].'

The Case in Hand.

Classification being now completed there is little difficulty in assigning the case in hand to its proper place. The dissenting

[1] *Meggy* v. *Imperial Discount Co.*, 1878, 3 Q. B. D. 711, 717. And see 47 L. J. Q. B. 119. It would be quite different, as the learned judge points out, were one man's furniture left in another man's house. There is, in that case, no misleading appearance of ownership. See Ewart on Estoppel, c. xxi.

[2] *Colonial Bank* v. *Cady* [1900] 15 App. Cas. 285; 60 L. J. Ch. 141.

[3] *Cornish* v. *Abington*, 1859, 4 H. & N. 556; 28 L. J. Ex. 262. And see *Sheppard* v. *Union Bank*, 1862, 21 L. J. Ex. 154; *Baines* v. *Swainson*, 1863, 32 L. J. Q. B. 281.

[4] *Moore* v. *Moore*, 1887, 112 Ind. 152; 13 N. E. Rep. 673. And see *Kingsford* v. *Merry*, 1856, 11 Ex. 577; 1 H. & N. 503; 25 L. J. Ex. 166; *Pease* v. *Gloahec*, 1866, L. R. 1 P. C. 229; 25 L. J. P. C. 166; *Babcock* v. *Lawson*, 1880, 5 Q. B. D. 284; 49 L. J. Q. B. 408; *Root* v. *French*, 1835, 13 Wend. 570 (approved in *Henderson* v. *Williams* [1895] 1 Q. B. 529; 64 L. J. Q. B. 308); *Trustees* v. *Smith*, 1890, 118 N. Y. 640; 23 N. E. Rep. 1002; *Brant* v. *Virginia*, 1876, 93 U. S. 327; Ewart on Estoppel, 302 f.

judge (Stirling L.J.) treats it as belonging to the ostensible agency class. He says that

'the only question is whether the case is within the exception' that 'if the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded,' &c.

There was of course no such element in the case, for there was not, to the purchaser, any appearance of agency at all or of authority to sell, and the learned judge therefore (although unwillingly) acquits the owner of legal blame. But the case (with submission) has nothing to do with ostensible agency. It is (although a little complicated) a case of ostensible ownership, and the reasoning applicable to it is this: If the owner had clothed the clerk with the apparent ownership, and the clerk had sold to an innocent purchaser, the owner would have been estopped; and the result is the same if the owner enabled the clerk to assume the appearance of ownership. The difference between giving to another an appearance of ownership or authority, and enabling that other to assume such appearance, is in the law of estoppel quite immaterial. The question must be looked at from the purchaser's side: Here is a man[1] who appears to own these goods; the true owner did that which enabled the man to present such an appearance; therefore the true owner should lose.

Suggested Solution.

But we must if possible get at some working principle. If we cannot say that an owner is not to be estopped unless he intended that somebody should act upon what he has done; and if, on the other hand, the sweeping proposition that 'wherever one of two innocent persons must suffer by the acts of a third person, he who has enabled,' &c., cannot be supported, where ought the line to be drawn?

In a book issued about a year ago the present writer formulated a principle of 'estoppel by assisted misrepresentation,' of which, as he thinks, the *Lickbarrow* v. *Mason* rule was an early precursor stated too broadly and lacking in precision. That a man may be estopped by his own misrepresentation is very familiar law. And for the proposition that he may be also estopped

[1] That the clerk was then operating under an assumed name may be of some importance. Had the clerk used his power to transfer the goods to an accomplice who then sold to an innocent purchaser, the estoppel of the owner would have been very apparent and would probably not have been questioned. The use of a fictitious name instead of a real accomplice leaves open the possible argument that the purchaser himself contributed to the fraud by the omission of inquiries as to the identity of his vendor. Did he too assist the misrepresentation by lack of usual business precaution? Is the case one of contributory negligence? Can the purchaser put all the blame upon the importer?

by the misrepresentation of another person, if he has assisted it, there are hundreds of authorities. But the reduction of those cases (examples of which are to be found in almost every department of the law) to a common basis, and the application to all of them of one principle or set of principles was not undertaken until recently. The writer suggested:—

'that one man may be estopped by a misrepresentation made by another, when the former, in breach of some duty to the deceived person, has supplied the defrauder with that which was necessary to make the representation credible. If the fraud was accomplished without assistance, there can, of course, be no estoppel (of any one but the defrauder). If although there was assistance, yet if the assistance was an immaterial factor in the accomplishment of the fraud, there ought likewise to be no estoppel—the assistance did not furnish the occasion or the opportunity for the fraud. But if the assistance was in some way essential to the success of the fraud—furnished the occasion or opportunity for it; made credible a representation which without it would not have been successfully made—then, if there has been a breach of some duty in rendering the assistance, estoppel will ensue[1].'

For example, a mortgagor falsely representing himself as the owner of unencumbered property conveys it to an innocent purchaser, and the position of the mortgagee is unaffected, for he has in no way assisted the misrepresentation, and the purchaser has but himself to blame. Suppose, however, that the mortgagor, upon some trumped-up excuse, induces the mortgagee to hand over the deeds; and that with the help of these the misrepresentations of unencumbered ownership are made credible to the purchaser, the owner will be estopped because of the assistance rendered to the misrepresentation—he has done that which was ordinarily necessary to make it successful.

So also in the classes of cases which we have already been considering: a man falsely representing himself as my agent makes a contract upon my behalf, and I, of course, am not bound. But if I have in some way held out the man as having my authority, I am estopped by the assistance rendered to the misrepresentation. And this doctrine can be successfully carried through all departments of the law to which the *Lickbarrow* v. *Mason* formula has seemed to be applicable—and there is no more ubiquitous rule.

Among other analyses of misrepresentation, then, as a ground of estoppel, it may be divided into (1) personal, and (2) assisted misrepresentation; and assisted misrepresentation may be divided into cases of (*a*) passive, and (*b*) active assistance. Without this classifi-

[1] Ewart on Estoppel, 20, 21. Sufficient sources for the language employed are given in the note on p. 21.

cation it is impossible to answer the question which we have in hand; and without these distinctions no solution (as the present writer thinks) can be satisfactory.

Personal Misrepresentation. Supposing some person asks me a question and I give a false answer, but I have no notion that the questioner intends to change his position upon the faith of the reply, am I estopped? An American judge has supplied a pithy answer:—

'Certainly no one can be estopped by a deceptive answer to a question which he may rightly deem impertinent and propounded by a meddling intruder[1].'

And Lord Cranworth formulates the rule in this way:—

'But if the party has unwittingly misled another, you must add that he has misled another under such circumstances, that he had reasonable ground for supposing that the person whom he was misleading was to act upon what he was saying[2].'

Baron Parke is much to the same effect:—

'If whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the reply would be equally precluded from contesting its truth[3].'

An American judge puts it in this form:—

'If the circumstances are such that a reasonable man under the circumstances would anticipate that it was to be acted upon, that will be sufficient[4].'

Consideration of these and other authorities has induced the statement that, in cases of personal misrepresentation, estoppel will ensue only where the misrepresenter had

'reasonable ground for anticipating some change of position as a result of his misrepresentation.'

It is not at all essential that he should have intended that action should follow his misrepresentation. It is quite sufficient 'that he had reasonable ground for supposing'—'that a reasonable man

[1] *Pierce* v. *Andrews*, 1850, 60 Mass. 6. And see *New Brunswick* v. *Conybeare*, 1862, 9 H. L. C. 726; 31 L. J. Ch. 297.

[2] *Jorden* v. *Money*, 1854, 5 H. L. C. 212; 33 L. J. Ch. 865. And see *West* v. *Jones*, 1851, 1 Sim. N. S. 205; 20 L. J. Ch. 362; *Mangles* v. *Dixon*, 1852, 3 H. L. C. 702; *Manufacturer's Bank* v. *Hazard*, 1864, 30 N. Y. 226; *Wallerich* v. *Smith*, 1896, 97 Iowa, 308; 66 N. W. Rep. 184; *Moore* v. *Spiegel*, 1887, 143 Mass. 413; 9 N. E. Rep. 827.

[3] *Freeman* v. *Cooke*, 1848, 2 Ex. 654; 18 L. J. Ex. 114. And see *Preston* v. *Mann*, 1856, 25 Conn. 128, 129; *Ford* v. *Fellows*, 1889, 34 Mo. App. 630; 8 S. W. Rep. 791; *Daugherty* v. *Yates*, 1896, 13 Tex. Civ. App. 646; 35 S. W. Rep. 937; *Sessions* v. *Rice*, 1886, 70 Iowa, 306; 30 N. W. Rep. 735.

[4] *Two Rivers Co.* v. *Day*, 1899, 102 Wis. 328; 78 N. W. Rep. 442. And see *Kingsman* v. *Graham*, 1881, 51 Wis. 232; 8 N. W. Rep. 181; *Tracy* v. *Lincoln*, 1887, 145 Mass. 357; 14 N. E. Rep. 122.

would anticipate, that it was to be acted upon,' although as a matter of fact he never gave the matter a thought.

Assisted Misrepresentation. The assistance rendered to a misrepresenter may, as has been said, be either (1) passive, or (2) active.

(1) Of the former class the most usual is the familiar case of standing-by while some other person assumes to act as your agent or deal with your property. And it is well-settled law that in such cases the bystander is estopped, if he 'suffer another' to 'act under an erroneous impression[1],' if 'perceiving his mistake' the bystander should 'abstain from setting him right[2]': in other words, if the bystander had 'reasonable ground for anticipating some change of position' as a result of his silence.

(2) A different rule has, however, to be formulated for cases where the assistance is of active character. For in these cases the estoppel-denier is usually quite as innocent as the estoppel-asserter[3]; he does not make the misrepresentation and he is unaware that it is being made; it is the rascal who makes it and who secretly uses such assistance as he has been supplied with to make it credible.

For example, reverting to the case in which the mortgagee handed over the deeds to the mortgagor and found that they had been fraudulently deposited for a loan, it is evident that we cannot now say that estoppel will ensue if the mortgagee had 'reasonable ground for anticipating some change of position as a result of his (or anybody's) misrepresentation'; for the mortgagee was not only quite innocent of the fraud, but had no intention whatever that anybody should change his position upon the faith of his complacency. He did not in fact anticipate any misrepresentation, and could not therefore have anticipated the result of it.

For all cases of this class it is suggested that the true rule is

'that the change of position of the estoppel-asserter must have been reasonably consequent upon the assistance which has been rendered by the estoppel-denier[4].'

For example, although the mortgagee (in the case just put) could not have anticipated that the mortgagor would deposit the title deeds instead of returning them as he had agreed; yet it may be said that the mortgagee in handing over the deeds did that which was 'essential to the success of the fraud, furnished the occasion or opportunity for it, made credible a representation which without it

[1] Per Chancellor Kent in *Wendell* v. *Van Rensselaur*, 1 Johns. Ch. 344.
[2] Per Lord Cranworth in *Ramsden* v. *Dyson*, 1866, L. R. 1 H. L. 140.
[3] The phrases estoppel-denier and estoppel-asserter save cumbrous descriptions of the actors in estoppel cases, and are, it is thought, sufficiently apt and explicit to induce their adoption.
[4] Ewart on Estoppel, c. xiii.

could not have been successfully made,' and that the change of position of the estoppel-asserter was therefore reasonably consequent upon the assistance rendered by the mortgagee. Application of this rule to the cases belonging to the class under consideration will recommend it to the profession.

Coventry v. *Great Eastern Railway Co.*[1] A railway company by mistake issued a delivery order in respect of goods which it had not received; the plaintiff advanced money upon the faith of the representation of ownership by the holder of the order, assisted by the order itself; and the company was estopped from denying its possession of the goods. It is usual to act upon the faith of such documents. The advance was reasonably consequent upon the issue of the false certificate.

Re Bahia, &c. Ry. Co.[2] A company by mistake, or induced thereto by fraud, issued an erroneous certificate of shares; the holder aided by the certificate sold the shares, representing himself as entitled to them; and the company was estopped. Certificates are granted for the 'more easily dealing with shares in the market.' The purchase of them was reasonably consequent upon the issue of the certificate.

Lickbarrow v. *Mason*[3]. An unpaid vendor of goods shipped them to the purchaser and indorsed to him the bill of lading; the purchaser transferred the goods and the bill to an innocent sub-purchaser; and the unpaid vendor was precluded from exercising his right of stoppage *in transitu*. It is usual to 'give credit to the bill of lading.' The sub-purchase was reasonably consequent upon the transfer of the bill.

Waldron v. *Sloper*[4]. This is one of the mortgage cases above referred to. The mortgagee is estopped because he enabled the mortgagor to pose as unencumbered owner. The change of position upon the part of the subsequent depositee is reasonably consequent upon the equipment of the mortgagor with the ready apparatus for fraud.

Henderson v. *Williams*[5]. The owner of goods was fraudulently induced to instruct the warehouseman of them to transfer the goods to the name of the rascal, who thus equipped with evidence of title sold the goods. This sale was reasonably consequent upon the transfer to the rascal.

Johnson v. *Crédit Lyonnais*[6]. A purchaser of goods buying at a dock left the dock-warrants with the vendor and took no steps

[1] 1883, 11 Q.B.D. 776; 52 L.J.Q.B. 696.
[2] 1868, L.R. 3 Q.B. 584; 37 L.J.Q.B. 181. [3] 2 T.R. 63, 1 R.R. 425.
[4] 1 Dr. 193. See also *Clarke* v. *Palmer*, 1882, 21 Ch.D. 124; 51 L.J.Ch. 634; *Newman* v. *Newman*, 1885, 28 Ch.D. 674; 54 L.J.Ch. 598.
[5] 1894, 64 L.J.Q.B. 308; [1895] 1 Q.B. 521.
[6] 1877, 2 C.P.D. 224; 47 L.J.C.P. 241; 3 C.P.Div. 32.

to have any change made in the books of the dock-company as to the ownership of the goods; the vendor remaining thus equipped with the documents of title sold the goods a second time; held that the first purchaser was *not* estopped; but Parliament before the case was decided in appeal passed a statute declaring otherwise[1]. It was this authority that made all the difficulty in the case under review, and led to the suggestion of Vaughan Williams L.J., which we are now considering. The statute being unnoticed, the authority was got rid of by a distinction which was sufficient for the purpose, but which would reverse very many cases usually believed to be quite unassailable.

Brocklesby v. *Temperance Building Soc.*[2] Vaughan Williams L.J. finds much support for his suggestion in this case. The owner of certain title deeds employed his son to raise money upon them, and at the same time directed him not to borrow more than a specified sum; the son obtained a loan of a larger amount from a person who knew of the power to borrow but was unaware of the limitation as to amount; and the lender was upheld in his claim for the whole advance. The learned judge applied the case in this way:—

'Suppose the father had merely entrusted the son with the deeds of the property and the son had fraudulently taken them and raised money on them, could it be said that the act of the father was within the rule? (that is the *Lickbarrow* v. *Mason* rule.) In my judgment it clearly could not have been said so, because the father would not upon the supposition have done any act which he intended to be acted upon . . . he did not intend the son to deal with the deeds at all.'

The above method of stating this case seems to place it in the class already referred to, namely that in which a wide power is given and some limitation as to its exercise is imposed—a class in which the agent acts within the power but not within the authority. In those cases (as has already been seen) it may very truly be said that the principal intended somebody to act upon the power, but it does not at all follow that he may not be estopped in other cases in which he has no such intention[3].

[1] 40 & 41 Vic. c. 39, s. 3. In commenting upon this case the present writer predicted that although it had been reversed by Parliament yet 'the decision remains as a formidable obstacle should we again try to proceed upon principle,' Ewart on Estoppel, 337.

[2] [1895] A. C. 173; 64 L. J. Ch. 433.

[3] The present writer is not at all satisfied, however, with this method of disposing of *Brocklesby* v. *Temperance Building Soc.*, and he has (possibly with some temerity) suggested reasons for doubting the correctness of the decision itself. Suppose that the son had had authority to sign a note for £100, and misrepresenting his authority signed one for £500 and passed it off, no one would suggest that the father would be liable. The cases are exactly parallel—in both the lender must ascertain the extent of the agent's authority. Neither of them is a case in which the power is one thing and the authority another. Neither is a case of general power to do a series of acts with

All the cases referred to by Vaughan Williams L.J., as well as others, have now been reviewed, and the result is:—

(1) The suggestion that the true owner will be estopped only when 'the act he has done is an act intended to be acted upon by somebody' is true of but one class of cases, and true there only because the class happens to be composed solely of instances in which such intention is one of the factors.

(2) There are other classes of cases in which estoppel ensues, although the act done by the true owner was not one 'intended to be acted upon by somebody.'

(3) The rule for cases of personal and passively assisted misrepresentation is that the true owner will be estopped when he had reasonable ground for anticipating some change of position as the result of the misrepresentation.

(4) The true rule for cases of actively assisted misrepresentation is that the change of position must have been reasonably consequent upon the assistance rendered by the estoppel-denier.

(5) These rules apply, of course, as well to cases of ostensible ownership as to cases of ostensible agency.

Qualification of the Master of the Rolls.

It will be remembered that the Master of the Rolls suggested that

'the act which has enabled the third person to occasion the loss must . . . be connected with the fraud which has caused injury to one of those two persons in the sense of bringing about the fraud.'

While reading the foregoing exposition some readers have been dissenting from the applicability of the phrase 'reasonably consequent upon the assistance rendered.' Can it be said (they have thought) that the commission of a fraud is reasonably consequent upon the possession of means to accomplish it? In the case under

private instructions and limitations attached to the power. The House of Lords (in the *Brocklesby* v. *Temperance Building Society's* case) was misled (as the present writer ventures to think) by a case in which a mortgagee handed over the title deeds to a mortgagor upon the understanding that £15,000 should be borrowed upon them; the mortgagor borrowed £50,000, and the lender was upheld, Lord Herschell saying: 'I confess I am quite unable to see any distinction in principle between the two cases.' But with the highest respect for one of England's greatest judges, the distinction is that between ostensible ownership and ostensible agency. In the case last mentioned, the mortgagor having the deeds appeared to be the unencumbered owner of the property, and could borrow what he pleased; the lender knew nothing of agency whatever and could not therefore inquire into extent of authority. In the *Brocklesby* case, however, the lender is approached by a man who says 'Here are my father's deeds. I am authorized to borrow £500 upon them.' Why should not the usual rule apply here, that the extent of an agent's authority must be, at your peril, ascertained? If a principal has done anything to accredit an agent as having authority greater than that really assigned to him, that of course is another matter.

review, for example, can it be asserted that the transfer of the goods to the fictitious name, and the subsequent sale to an innocent purchaser were reasonably consequent upon the grant of power to sign delivery-orders? They were certainly not a necessary consequence of the grant; and upon the other hand they were so connected with the grant that they could not have occurred without it. To use the language of the Master of the Rolls, the grant of the power was connected with the fraud 'in the sense of bringing about the fraud.' If so, it may be said inversely that the fraud was the reasonable consequence of the grant of authority:

> 'How oft the sight of means to do ill deeds
> *Makes* ill deeds done'![1]'

And the rule couched in the language suggested thus receives confirmation from the case under review.

The learned judge furnishes further comfort to the present writer. Until his judgment, the language of Blackburn J. in *Swan* v. *North British Australasian Co.*,

'The neglect must be in the transaction itself, and be the proximate cause of the leading the party into the mistake[2],'

although found to be embarrassing[3], was not recognized as imposing, in the classes of cases under review, an impossible prerequisite. The present writer's book, indeed, had a sentence to the effect that such a rule 'is an impossible one[4]'; for the 'neglect' in cases

'of assisted misrepresentation never can be the proximate cause of the leading of the person into the mistake. There is always interposed the misrepresentation of some third person.'

The Master of the Rolls, with more acceptance than the wilderness-crier could expect, and without any reference whatever to previous judicial difficulty, now says:—

'With regard to the argument that it was the fraud of the clerk, and not the authority given to the dock-company which was the proximate cause of the loss, the rule as to which of two innocent persons is to bear a loss only comes into play when a fraud has been committed; and if we are to give weight to the argument we might as well strike the rule altogether out of the law of England. I do not think that we ought to do so.'

JOHN S. EWART.

WINNIPEG, CANADA.

[1] King John, iv. 2.
[2] 2 H. & C. 181; 28 L. J. Ex. 273.
[3] *Seton* v. *Lafone*, 1887, 19 Q. B. Div. 68; 56 L. J. Q. B. 415.
[4] Ewart on Estoppel, 119.

HINDU LAW AND ANGLO-INDIAN LEGISLATION.

HINDU law at the present time is in a state of arrested development. The methods by which in former days it was in a measure brought into harmony with changed conditions of life no longer operate, the race of commentators is long since extinct, and the British Courts, so far from helping forward the work of development, have rather tended to stereotype the rules found in the Sanskrit texts. It may be otherwise in the Native States, but in British India the time would seem to have come when the remedy by legislation, the only possible remedy in some circumstances, should be applied.

Recently a gallant, but in the result fruitless, attempt has been made by a distinguished Brahman lawyer to set the legislative machine in motion with regard to a small though by no means unimportant branch of law. In the regions in which the Mitakshara or Benares school of law is followed and the joint-family system is strictly observed, it may be said generally that, until the contrary is proved, all the property found in the hands of any member of a family is property of the joint family, and that he cannot assert of any piece of such property that it is his separate property of which he can dispose as he likes. Only by partition can the members of a family acquire a title to separate parts of the family property, and to Nairs and others in Malabar governed by a similar law even this expedient is not open except with the consent of the whole family. As a general exception from the rule it may be said that when a man acquires any property solely by his own exertions, and without any aid from the family estate, the property so acquired is his separate property, and he may deal with it as he pleases by gift during his lifetime, according to the Malabar law, and by gift *inter vivos* or by will in other countries where the Mitakshara prevails. This general proposition is stated in Manu and in Yajnavalkya in much the same terms. Whatever is acquired by a man's own labour without using the patrimony is not partible among his brothers or co-heirs.

It is in the application of this proposition to the particular case of property 'acquired by learning' that special difficulty has arisen. In both the authorities just mentioned the case is given by way of illustration; such property belongs to the acquirer only and is not

partible. So far there would not be much room for discussion; for no reference is made to the means whereby the learning is acquired and no distinction suggested between different kinds of education, general and special, or between ordinary and extraordinary gains of learning. But a difficulty is introduced by a third text, that of Katyana, which describes 'wealth gained by learning' as that which is 'acquired by learning after instructions received from a stranger and maintenance provided by one of a different family,' and still more by the commentary of Mitakshara, the author of which insists on the requirement of absence of detriment to the paternal estate. Wealth therefore which is the result of learning imparted at the expense of the family becomes part of the family property, and is not the separate property of the individual. This proposition, although accepted by the Madras High Court to its full extent in a case where the earnings of a vakil who had received at his father's expense nothing more than an ordinary and general education were in question, has not been approved in the other courts nor even in Madras in recent years, and was not unnaturally stigmatized by the Judicial Committee as somewhat startling; for, as they observed, stated in plain terms, it comes to this, that if a member of a joint Hindu family receives any education whatever from the joint funds, he becomes for ever after incapable of acquiring by his own skill and industry any separate property. The opinion apparently indicated by the Committee was that in deciding the question reference must be made to the nature and extent of the education, education of a general character being distinguished from special training for a particular profession, and it may probably be taken that any case arising in future will be dealt with upon those lines. The distinction is a plausible one, and for Bengal there is authority for it in the Dayabhaga, according to which in order to make property acquired by an individual common property it must be shown that family funds were directly and expressly used for the purpose of gaining it. 'It becomes not common merely because property may have been used for food or other necessaries, since that is similar to the sucking of the mother's breast.' But it may well be doubted whether it is right or desirable to apply this test in a country where the Mitakshara prevails. And meanwhile until the question is decided by the Judicial Committee, the law is, owing to the conflicting authorities on the point, in a state of the greatest uncertainty.

This is the question for the solution of which the legislature has been invoked, and it is one as to which there seems good ground for holding that it ought to be solved, and solved in no other way than that proposed. What the bill in substance proposed was this, that

property acquired by a member of a Hindu family by means of skill or learning should be deemed to be his separate property, notwithstanding that he was educated by the aid of family funds or maintained out of such funds during the period of his education. Two merits may be claimed for this proposal. In the first place it is in harmony with the ancient texts, when read without the construction put upon them in the Mitakshara. And, secondly, the rule which it lays down is simple and easy of application, in this respect contrasting favourably with the rule suggested by the Judicial Committee. According to the proposal made in the bill the law regarding self-acquisition would remain unchanged save in this one respect, that for the future no inquiry need be made into the means whereby the education of the acquirer was brought about. The person asserting that any particular property was self-acquired would still have the burden of proof thrown on him, but he would be relieved from proving that it was not by aid of the family estate that the training and consequent skill which conduced to the acquisition of the property came to be imparted. In order to appreciate the importance of this relief it is necessary to explain what is implied by the alternative rule suggested by the Judicial Committee. According to it there must be an inquiry into the history of the education or training of the individual whose property is under discussion; it must be considered how far the property acquired can be said to owe its origin to the training that has been received, and there must be an inquiry as to the funds out of which the expenses of the training came to be met. In the rare cases in which a Hindu has as a boy been sent to England, enjoyed an expensive education, and subsequently on return to India made a fortune by means of the profession for which he has been trained, there can of course be little difficulty; though even in such cases it must be remembered that it is not the mere cost of his education that has to be reimbursed to the family, but that his whole fortune, however large in comparison with that cost, is the property of the family and not the separate property of the individual. It is no answer to say that he may insist on a partition and thus free himself from bondage, for that is a desperate remedy entailing a disruption of the family and in most cases tedious and expensive litigation. In the more ordinary cases in which the expenses of a boy's education are met by a number of small payments made during a period of several years, some perhaps by the father, some by relations standing outside the family circle, some even as is not uncommon by complete strangers, the problem becomes more difficult. There may be a question whether the contributions from the family chest were large enough

in proportion to the total cost to justify the conclusion that the boy was substantially educated at the expense of his family; there may be a question as to the nature of his education, whether it was usual and general or special, and there may be a question as to whether it actually contributed as a cause to the effect in the shape of wealth with which it is credited. Some of these questions it may be difficult to answer positively during the lifetime of the individual. The man who has made a fortune cannot with any certainty, even by the aid of legal advisers, predicate of it that it is his own separate property. The best that he can do to protect it is to have recourse to a benami transaction, that is to say, to transfer his property into the name of a stranger, in the hope of thus concealing it from the other members of the joint family.

But in many instances the dispute arises after the death of the individual, and many years after the happening of the events into which inquiry has to be made. The common case in which questions with regard to self-acquired property come into the courts is the case in which a Hindu has died leaving no son, but only a widow or daughter, and having bequeathed to her the money earned during his lifetime. Almost inevitably, if the property is substantial, some co-parcener will come forward to claim it to the exclusion of the legatee. In such cases, and in the almost equally common case of the drones of a family trying to secure for themselves a share of the wealth which has been gained by the more energetic member, it is most desirable to narrow as far as possible the scope of the inquiry, and to eliminate elements of uncertainty, and thus in a measure to diminish the litigation which is now as common as it is ruinous to Hindu families. This object would assuredly have been furthered by the bill, and there seemed to be every reason to suppose that it would become law. It was before the public for several years. The Secretary of State gave leave for the introduction of the bill as a non-government measure, observing that it related 'to a question of great importance and interest to all Hindus, not only in the Madras Presidency but throughout India,' but adding an unfortunate suggestion which will shortly be mentioned. The bill received all possible publicity; it was canvassed in the press and discussed at length in the legislative council, and finally was passed by that body in due form, the government of Madras having previously declared that the balance of argument was in favour of the bill, and that in their belief it would if passed into law 'on the whole tend to abate practical abuses and inconveniences which ought to be remedied in order to open the way for wholesome social progress.' Notwithstanding all this, and when the bill

seemed to be safe in port, the Governor, on the eve of his departure from India, interposed with his veto and the bill was wrecked. It may safely be assumed that he was induced to take this step under the impression that the measure was regarded by the people as interfering with their religious code and was therefore unpopular, and weight was probably given to this impression by the fact that in his dispatch the Secretary of State had suggested that the sanction of the Governor-General might be necessary in view of the bill being considered as affecting the religion or religious rites and usages of a class of His Majesty's subjects in India. It is somewhat difficult to understand how any Hindu can honestly regard the measure as affecting his religion, except indeed on the theory that law and religion are among Hindus one and the same thing. Whether the measure would be generally popular among the old-fashioned Hindus is a question which, owing to the want of materials, it is quite hopeless to discuss. There are no means in India, such as there are in England, of eliciting the opinion and sentiments of the people, and it is not so easy as it may appear to highly placed officials with brief experience of the country to ascertain the real truth on such matters. But when a measure has been found by the government to be salutary, as was the case with this bill, and when it has not been opposed in such a way as to show that it would be positively unpopular, one would have thought that the Governor might have rested content, instead of putting faith in representations subsequently made to him and reversing the action of the legislative body. Especially might this have been expected when it is considered that this measure was of a technical character on which uninstructed people would practically have no opinion, and that it was promoted by an orthodox Brahman and backed by other Brahmans as learned as they were orthodox.

The fate of the bill is a serious precedent. Inevitably and for some time to come it must discourage any similar attempt to amend or improve the Hindu law. Nobody in these days would venture to follow the bold example set by an accomplished lawyer about a quarter of a century ago, and attempt a codification of the Hindu law. But it is another question whether it is not right and expedient that the legislature should deal with isolated topics of law in which it is shown that uncertainty exists, or that the accepted rule is unsuited to the present conditions of life. There are precedents in favour of such action, notably the legislation in Bombay which rescinded the strict rule of Hindu law, whereby a son was liable to pay his father's debts although no assets had been inherited, and replaced it by the rule prevailing in other

parts of India. The present case is not one in which it is reasonable to expect that a satisfactory solution may be reached through the medium of the courts; for it may be years before the precise question is again brought before the Judicial Committee in a Mitakshara case, and when that does happen it is possible, not to say probable, that it will receive an answer which, as I have endeavoured to show, will not be conducive to the security of property or the peace of Hindu families.

H. H. SHEPHARD.

THE ORIGINS OF THE FRENCH CANADIAN LAW.

IT is not often that a law book can be called amusing, and yet, without in any way detracting from the merit and value of the work as a legal study, we think we may fairly describe Les Origines du Droit Franco-Canadien by Dr. Rodolphe Lemieux, C.R., M.P.[1], as being at once both an instructive and amusing book. Considering the important position which the French Canadian occupies in the Dominion of Canada, and the fact that he has, in spite of many difficulties, secured for himself a peculiar system of law in which he rejoices, it ought to be a matter of interest to people in other parts of the Empire to learn how that law originated, and how it is that it comes to form to-day a part of the law recognized in the Dominion as governing the rights of the people of one of its Provinces. To all who desire a knowledge on this subject we can heartily recommend Dr. Lemieux's work.

In the beginning of the book the author has given a tolerably long list of the various authorities which he has consulted in its preparation, and one can readily perceive from it that, though the book comprises less than 500 pages, it is nevertheless the fruit of much careful study. The author begins by tracing the history of the feudal system as it obtained in France with all its diversities in different parts of the country, which resulted, as is well known, not only in different systems of law prevailing in the same country, but even in different systems being applicable to inhabitants of the same district according to their place of birth. He shows how Roman, German, and Gallic law each played a more or less prominent part in the formation of the laws and customs of various parts of France.

The feudal system in France had many points in common with the feudal system of England. But one thing is remarkable, that while the burthens and exactions which that system entailed on the lower and middle classes were largely swept away in England in the reign of Charles II, they survived in France in all their enormity and oppression down to the era of the French Revolution; and it

[1] *Les Origines du Droit Franco-Canadien.* Comprenant:—(1) l'histoire du droit Français depuis l'époque Gallo-Romaine jusqu'à l'ère révolutionnaire inclusivement; (2) l'histoire du droit Canadien depuis la découverte du Canada jusqu'à la cession (domination Française) et depuis le Traité de Paris (1763) jusqu'à la confédération inclusivement (domination Anglaise). Par Rodolphe Lemieux, LL.D., C.R., M.P., Professeur à la faculté de droit de l'université Laval à Montréal.—Montréal.

may well be believed that the Revolution was in a great measure due to the effect of the feudal system, the tendency of which was to keep the great mass of the workers of the country in poverty and ignorance.

The French feudal system was peculiarly oppressive, and when we read of the extortions and exactions which it sanctioned at every turn, one wonders how it could have endured as long as it did. The lord not only exacted a rent from his tenants, but he had the right to compel his tenant to entertain him when he chose to visit him, to keep his dogs and his horses, to furnish a guard for his castle; moreover he could compel the tenant to grind his corn at his (the lord's) mill, and if the tenant sold his holding, or any transmission took place in its ownership in any other way, a heavy fine was payable to the lord. Military service was imposed on all tenants, and, in addition to the above exactions, there were taxes on crops and fruits grown, and on fish caught, and in fact the poor tenant could neither grow nor sell anything but he had something to pay thereout to his lord. In short, *tailles*, *corvées* and *banalités* were his ruin. In return for all this the lord protected him from being robbed by any other man than himself.

In addition to all the feudal exactions of the seigneurs, tithes were also payable to the church. The feudal system was, as the author explains, in the nature of a pyramid whose apex was the king; and as in the composition of the pyramid there were lords above lords, it is hardly to be wondered at that the man who formed the base of this pyramid, 'the man with the hoe,' was crushed to death. The ecclesiastical passion for acquiring land was prevalent in feudal times as it is now, and it is curious to find that in the twelfth century the same means were adopted to prevent this stoppage in the circulation of property as was recently adopted in England in the nineteenth century, and lands acquired by the church were required to be sold within a year after they were acquired, and if not the donees or purchasers were liable to be dispossessed by the authority of the feudal lord (see Imp. Act, 54 & 55 Vict. c. 73; and see also Rev. Stat. of Ontario, c. 112); but we are disposed to think the ordinance was a dead letter.

In his fifteenth chapter the author treats of the progressive development of the Courts Christian, and it is curious to note how, in the feudal era, rights were claimed by and accorded to the Christian church, as being matters peculiarly within its domain, which are now, by common consent, regarded as more properly within the cognizance of the secular authorities.

During the first seven centuries of the Christian era, the Christian church, as our author tells us, only recognized the fundamental

laws of the spiritual society, the Gospels, the Acts of the Apostles, the canons, &c., but, as he goes on to tell us, little by little its influence increased by reason of its strong and vigorous organization and its traditions, and, we might add, by the power it acquired as being in the aggregate the greatest landowner. The laity, as he goes on to say, from the highest lord to the lowest serf, were in the most profound ignorance, and they were obliged to have recourse to the clergy not only to discuss and resolve their affairs, but to read their title-deeds, and to draw up agreements and contracts between parties.

Dr. Lemieux attributes to St. Paul the origin of ecclesiastical jurisdiction: that apostle recommended Christians not to go to law before unbelievers, and recommended arbitration for settling disputes between Christians; and this was, according to our author, the foundation of ecclesiastical jurisdiction in matters relating to religion, which was extended later to temporal affairs; and, no doubt, in an age when the only literate persons were the ecclesiastics, the tribunals of the church presented many advantages, and were characterized by a more indulgent and more enlightened spirit of justice than was to be found in the lay tribunals. The ecclesiastical jurisdiction little by little enlarged the circle of its competence. In criminal matters it claimed and was allowed the exclusive right to deal with crimes against the faith, such as sorcery, heresy, and sacrilege. It also claimed and was allowed a concurrent jurisdiction with the lay tribunals, in regard to certain crimes committed by the laity, such as usury, adultery, &c. It claimed an exclusive right to deal with all civil claims against the clergy: this was called 'privilege of clergy,' which also assured to the clerical culprit, even in criminal proceedings, not only a more reasonable procedure, but a lighter punishment than a lay delinquent was compelled to endure. Birth, marriage, and death, all gave occasion to the church to claim jurisdiction—birth by reason of its connexion with the sacrament of baptism; marriage being a sacrament, the *dot*, the dower, and all that had relation to the validity or nullity of the marriage were held to be of ecclesiastical competence; death also, because a Christian ought to die in a state of grace; and the church, by virtue of this connexion, saw to his burial and was his executor, and as such became possessed of his estate to discharge his debts and legacies. Wills were required to be made before the *curé*, and it was necessary that they should contain 'pious legacies.' It is curious also to find how contracts even were drawn into ecclesiastical cognizance, for whenever a man swore to observe a contract the oath was administered by an apostolic notary; to violate his oath was a sin, and the judge of a sin was the ecclesiastical judge,

and thereupon by *connexité* the ecclesiastical judge must determine the case!—certainly a very curious process of reasoning[1]. Moreover, as being the greatest landowner in the kingdom, the church played a preponderating part in the formation of feudal institutions.

Dr. Lemieux traces the gradual development of the kingly power in France, and the subordination and curtailment of that of the feudal lords, a process which ended in making the sovereigns of France practically absolute and despotic. The culmination of that power took place in the reign of Louis XIV; thereafter it began to decline, until it was finally extinguished in the cataclysm of the Revolution.

Parliaments in France, of which there were several, were little more than courts of justice having local appellate jurisdiction, and as a rule appear to have had little or no legislative power. They seemed to have claimed with more or less persistency the right to refuse to register the royal decrees, without which it was a debatable point whether they had the force of law, and they appear at times to have endeavoured, as a condition of registration, to have proposed the removal of grievances of which they complained. But beyond this the laws were the decrees of the king, and in framing them his subjects, except his ministers, had no part or lot. Representative government has been a plant of slow growth in France, and has met with difficulties there which might not unnaturally be looked for among a people so long accustomed to despotic government.

The 'beds of justice' which the kings of France were accustomed to hold, and of which we read a good deal in Carlyle's French Revolution, were so called, as it appears from Dr. Lemieux, because the king was accustomed, on such occasions, to sit upon many cushions surrounded by the great men and nobility and the presidents of the various local parliaments. The ceremonial of the 'bed of justice' is described by Dr. Lemieux, chap. 24, s. 3. These 'beds of justice' were held when local parliaments were inclined to be refractory, in order to compel the registration of the royal decrees which were there read out, and were then ordered to be registered by the assembled presidents of the different local parliaments. The procedure was, however, regarded as violating the rights of parliaments, and as a species of *coup d'état*.

Notwithstanding the absolute character of the legislator, Dr. Lemieux speaks with great admiration of many of the royal ordinances thus promulgated, the work of able ministers, and particularly some of those of Louis XIV and Louis XV, which were practically useful codifications of some of the *disiecta membra* of the customary law.

[1] [In England the Courts Christian acquired a great deal of effective jurisdiction, in matters of *fidei laesio*, without either oath or notary.—ED.]

While the feudal law of property, as we have seen, bore hardly on the lower orders of society, the French criminal law was also of a peculiarly savage and cruel character. Probably the French were no worse than the English in devising cruel punishments, but the latter, at all events, were sooner brought to a better mind. Torture was a familiar mode both of discovering and punishing crime; and instances of its application in Canada as late as the eighteenth century are given by Dr. Lemieux. Lashes, applied to the naked body of the serf who stole a hog, sheep, hive, or a horse, was the punishment allowed in Burgundy. A slave working on Sunday, even though belonging to a Jew, was liable to whipping. A serf stealing a woman's hair was liable, according to whether she was free or not, to 200, or 65 blows with a stick.

Shaving a culprit's head was also resorted to, and sometimes, for the sake of example, only half his head was shaved. Amputation of the right hand, cutting off ears, putting out the eyes, and tarring and feathering were punishments inflicted for comparatively trivial offences. Tarring and feathering it seems was a punishment ordained by our own Richard Cœur de Lion on one of his crusading expeditions. His ordinance on this subject reads as follows: 'If any one is convicted of theft, boiling pitch shall be poured on his head, and he shall be covered with feathers from a pillow until he cannot be recognized. He will be then abandoned upon the first land the vessel shall touch'—a truly *rara avis*! Marking the body with a red-hot iron, drawing a victim in a cart to the pillory and binding him there, were also practised. Women slanderers were compelled to march through the town with two stones suspended from their necks, others were stripped and plunged into water. According to certain customs a man who allowed his wife to beat him was compelled to ride upon an ass, with his head to the tail. These were comparatively trifling punishments, but hanging and decapitation, accompanied by atrocious tortures before death, and mutilation afterwards were not uncommon. Burying alive and drowning in sacks were practised, as also tearing off the skin of a victim with red-hot pincers. One of the most horrible punishments was to attach the four limbs of the culprit to four horses and drag his body asunder. This, we may observe, was a punishment formerly reserved to traitors under the criminal law of England. The rack, stoning, hoisting up a victim with his hands bound to a long piece of wood, and then letting him fall from a height so that the weight of his body might dislocate his members, were also common modes of punishment: a similar mode of punishment to the last was applied to sailors, who were hoisted up in the air to a yard-arm and then let fall into the sea, sometimes with

a cannon ball tied to their feet so as to hasten their descent. It may well be believed that the comparatively merciful guillotine was a welcome substitute for the atrocious methods of inflicting the death penalty theretofore in vogue in France. Dr. Lemieux gives several instances where cruel punishments were inflicted in Canada during the seventeenth, and in some cases as late as the middle of the eighteenth, century under the French régime. By the French law in force in Quebec at the time of the cession, according to the collection published at the instance of Governor Carleton, the penalties for blasphemies and impieties were as follows: first offence, a fine proportionate to the goods of the offender and the quality of the blasphemies, two-thirds to the hospital of the place, and if there were none there, then to the church, and the other one-third to the informer. For the second, third, and fourth offences the penalty was to be doubled; for the fifth offence the culprit was liable to the punishment of the *carcan*, i. e. to be fastened to a post in some public place by an iron collar, and the culprit was besides condemned to a grievous fine; for the sixth offence he was put in the pillory and his upper lip was cut off with a hot iron; for the seventh offence, the pillory, and lower lip cut off in the same manner; for the eighth offence, tongue to be cut out. Enormous blasphemies which partook of the nature of infidelity were to be punished with the greatest fines, at the discretion of the judges. Sacrilege was punishable with death. Magic and sorcery were punishable with corporal punishment, and those who joined to the superstition impiety and sacrilege were punishable with death; for lese-majesty the culprit forfeited all his goods, and his body was tied to four horses and dragged asunder; for a soldier to speak to the enemy while on the march was lese-majesty; and unlawfully carrying arms, or holding unlawful assemblies was also lese-majesty. Coining, or debasing the coin of the realm, and even unlawfully making the instruments for coining, were punishable with death. To steal the king's money, or the public funds, was also an offence punishable with death. Public officers taking money or presents were severely punished by confiscation *de corps et de biens*; but the decrees varied on this point, and sometimes were confined to censure, to making honourable amends, the pillory, banishment, temporal or perpetual, and sometimes even death. Men who resisted the course of justice were liable to have their houses pulled down, and to corporal and pecuniary punishment as well. Homicides were divided into four classes: (1) murder, punishable with death, (2) necessary homicide in self-defence, (3) involuntary homicide, (4) casual homicide; the latter were not punishable. Highway robbers and housebreakers were condemned to the rack;

a domestic thief was punishable with death. Thieves of church property were rigorously treated, the men were sent to the galleys for life, and the women were imprisoned on bread and water for life, without prejudice in either case to the death penalty, if the case required it. Vagabonds and people without visible means of support, and mendicants, found no favour and scant justice. Those who called themselves Bohemians, or Egyptians, and their women and children were to be condemned, the men perpetually to the galleys, and the women and children to the hospital—another name for a prison—the male children until they were ready for the galleys. If any person condemned to the galleys committed any crime, or mutilated himself, he was liable to the death penalty. The bodies of suicides, who killed themselves of design and in cold blood, were dragged to the public sewer by the feet, and all the property of such suicides was confiscated to the king. Poisoners were punishable with death. Incendiaries of churches, or houses, were liable to be burnt; other incendiaries were liable to be sent to the galleys temporarily or perpetually, or to banishment. Parricide and violation of women under twenty-five years of age, whether they consented or not, were punishable with death. Concealment of birth, and depriving a child of baptism and public burial, were punishable with death. Usury was a crime, the first offence being punishable by fine, banishment, and amends, one-fourth of which went to the informer; a second offence entailed forfeiture of body and goods. Frauds by public officers, and forgery of public documents, were punishable with death. So that it is easy to see that the French Canadian criminal law was a pretty severe one.

The introduction of the English criminal law must therefore have been welcomed as an agreeable change, and the recital in 14 Geo. III, c. 83, s. 11, that 'the certainty and lenity of the criminal law of England, and the benefits and advantages resulting from the use of it, have been sensibly felt by the inhabitants, from an experience of more than nine years, during which it has been uniformly administered,' was most probably a true statement of fact, and no mere legislative fiction. But we may observe that the French feudal system in all its entirety and brutality does not appear ever to have prevailed in Canada even under the French régime. Of the various customs of France, that only of the Prévôté and Vicomté of France, otherwise known as the *Coutume de Paris*, was introduced into Canada. With regard to land, it would seem that the feudal or seigniorial system was established primarily with a view to the colonizing of the country (p. 331). Grants of large tracts of land many miles square were made to seigneurs or lords upon condition that they should grant them to sub-tenants in

smaller parcels, usually of about ninety *arpents*[1], at a low fixed payment not always uniform, we gather, but ranging from a half-penny to a penny an acre: this was the *cens*, but in addition to this there was also the *rentes*, which consisted of some small rental in kind in wheat, fowls, &c., and besides the 'cens et rentes' the lords were also to be entitled to certain oppressive rights and dues, which were also annexed to the holding. As Dr. Lemieux remarks, the old mills along the banks of the St. Lawrence are to this day a relic of the banal rights of the former seigneurs. These banal rights involved an exclusive right in the seigneurs to build mills, and exact a toll for grinding their tenants' corn thereat. The 'lods et ventes' were another oppressive exaction which the seigneurs were entitled to make upon any sale, or transmission of the tenant's holding, amounting to one-twelfth of its value. The seigneur had also a right, in case his tenant sold his holding, at any time within forty days after the sale to reject the purchaser, and himself resume possession of the land at the price for which it was agreed to be sold. When the seigniorial tenures were at last abolished these seigniorial rights were all compensated in hard cash to the tune of $10,000,000. For other rights, however, which the seigneurs claimed they received no compensation, e. g. the right to take from their tenants' lands wood for building, and stone for their own use and that of the public; the right to the possession of rivers, and the shores thereof, running through their tenants' lands; a right to a tenth of all fish caught in the fisheries; also the exclusive right to the watercourses for turning their mills and for manufacturing purposes: but the reason they failed to secure compensation for these alleged rights and privileges was because when their claims to them came to be investigated by the special tribunal appointed for the purpose at the time of the abolition of the seigniorial tenures, it was found that they were illegal and without any foundation in law.

Lord Bacon long ago declared that 'a people oppressed with taxes is unfit to rule,' and if there was ever a people oppressed with taxes surely it was the French and the French Canadians under the feudal régime; and Bacon goes on to point out that in nations where the nobility is too numerous the commonalty will be base and cowardly, and at length not one head in a hundred among them prove fit for a helmet, especially with regard to the infantry, which is generally the prime strength of an army. Whence though a nation be full peopled its force may be small. We need no clearer proof of this, he says, than by comparing England and France. For though England be far inferior in extent and number of

[1] An *arpent* is a little larger than an English acre.

inhabitants, yet it has almost constantly got the better of France in war, for the reason that the rustics and lower sort of people in England make better soldiers than the peasants of France[1].

What was true of the old world proved also true in the new. How else can we explain that the French with larger numbers and ably led by men of very distinguished ability, and with an almost impregnable fortress at their command, nevertheless had to yield to the English attack?

No sooner however does Jean-Baptiste begin to breathe as a freeman than he proves in not a few hard-fought fields that he is a worthy companion in arms of his English fellow subjects and as able and willing as they, if need be, to defend with his life-blood his country, his hearth, and home against hostile invaders.

To any one accustomed to English law, notwithstanding all its imperfections, it is hard to understand how the great body of the Canadian people could ever have voluntarily desired to maintain the French Canadian feudal system in force after the cession of Canada to Great Britain. The truth of the matter probably is that the ruling classes, the seigneurs and ecclesiastics, those who profited by the grievous exactions of the seigniorial tenures, were those who strenuously stipulated for the continuance of those laws, and as usual 'the man with the hoe' was not considered. Not only were the land laws oppressive, but the other branches of French law in force in Canada at the time of the cession, Dr. Lemieux is compelled to admit, were in an absolute state of chaos, and presented the aspect of a labyrinth both to the magistrate and practitioner. Quoting M. Loranger, he says that in order to ascertain the law on any point it had to be learnt in the texts or commentaries published in France, prior to the Code Napoléon, either before or since the establishment of Canada; only one complete work had been published on the colonial law[2], and for the rest they had merely fragmentary essays, and it was necessary to study pell-mell, and at hazard, the texts and glosses spread through thousands of volumes; so that the knowledge of the books to be studied was of itself a study. To add to the difficulty, the reprinting of the ancient French treaties ceased in France after the promulgation of the Code Napoléon, as being no longer of use there, though they were still the authorities of the French Canadian law. The laws which the French Canadians made such a point of

[1] See note A, p. 191 below.

[2] Dr. Lemieux does not give the title of this work: it was probably the abstract of those parts of the *Coutume de Paris* received in Quebec in the time of the French Government, drawn up by a select committee of Canadian gentlemen well skilled in the laws of France and of that province, and published 'by the desire' of Governor Carleton in 1772.

preserving were therefore, at the time of the cession, neither certain nor easily ascertained, and it was not until long after the cession that order and precision was given to them by the labours of the Lower Canadian jurists, which resulted in 1867 in the *Code Civil* and the *Code de Procédure Civile.*

Dr. Lemieux dwells at some length on the efforts from time to time made by the English-speaking inhabitants of Canada to introduce the English law, and he seems inclined to charge them with breach of faith in so doing; but he fails, we think, to realize that it was only natural that they should make that attempt. French Canadian law was, as we have seen according to Dr. Lemieux's own statement, in a practically chaotic condition, and moreover it was locked up in a thousand treatises written in what to English people is a foreign tongue. This latter difficulty, no doubt, was felt by French-speaking people with regard to the English law. It seems to be a mistake however to suppose that the English inhabitants had any sinister designs on the liberties of their French Canadian fellow subjects. They probably merely viewed the matter from a purely utilitarian standpoint, and sought to establish that system of law which would prove the best security, not only for their own rights and liberties, but also for those of the great mass of the people of Canada and to describe this as a 'projet monstrueux' seems to be, to say the least, ridiculous. They did not propose or desire to establish for the French any system of law which they were not willing and ready to adopt for themselves. Dr. Lemieux has shown the oppressive character of the French law in regard to land, the very basis of all national property, and there can be little doubt that if the well-meant efforts of the English element to establish English law throughout Canada had succeeded, it would have led to a much earlier removal of those oppressions and at a much less costly price than had to be ultimately paid therefor, and would consequently have been a great boon to the great mass of the people of Canada and probably millions of dollars in the pockets of the people of Quebec; but as has often happened in the world's history it was not the true welfare of the 'masses' but the privileges and aggrandizement of the 'classes' which carried the day. This chapter of French Canadian history is a curious one. At the capitulation of Montreal, September 8, 1760, the 42nd article proposed by the French stipulated that 'The French and Canadians shall continue to be governed according to the *Coutume de Paris* and the laws and usages established for this country, &c.,' to which General Amherst gave the following equivocal answer, 'They will become subjects of the King.' The Treaty of Paris, 1763, whereby Canada was ultimately ceded to

Great Britain, contained no stipulation on this point, but the royal proclamation of October 7, 1763, which established a civil government for the province of Quebec (which then included what afterwards became the province of Upper Canada), consisting of a governor and general assembly, and empowered them to establish courts of justice for the hearing and determining causes, as well criminal as civil, according to law and equity, and as near as may be agreeable to the laws of England, &c. This was apparently a perfectly constitutional procedure, and if it had been resolutely persisted in might have ultimately led to the establishment of English law from the Atlantic to the Pacific. Unfortunately an agitation was got up by the privileged classes, who probably thought they foresaw in the prevalence of English law the loss of many opportunities of fleecing their less fortunate compatriots, and the time selected for the agitation was well chosen. The war with the revolted colonies was still being waged, it was politically necessary for Great Britain to keep on good terms with the seigneurs and the ecclesiastical authorities of the province of Quebec, and their wishes alone were regarded. This we think is manifest from the report of Lord Thurlow, then Attorney-General, of January 22, 1773, cited by Dr. Lemieux, in which he said: 'The Canadians seem to have been strictly entitled by the *jus gentium* to their property as they possessed it upon the capitulation and treaty of peace, together with all its qualities and incidents, by tenure and otherwise, and also to their general liberty, for both which they were to expect Your Majesty's gracious protection.

'*It seems a necessary consequence that all those laws by which that property was created, defined, and secured, must be continued to them.* To introduce any other, as Mr. York and Mr. De Grey emphatically expressed it, tends to confound and subvert rights instead of supporting them.' This specious argument in the interest of the landowners prevailed, and the fatal policy of retrogression was begun, when by the Quebec Act, 1774, the French law as to property and civil rights was restored in Quebec. It is generally easy to be wise after the event, but it does seem unfortunate that the policy which had to be adopted about ninety years later of abolishing the seigniorial tenures was not then boldly taken in hand. Instead of that the French law of property was, as we have seen, introduced solely because of its supposed necessity for preserving the rights of the seigneurs, and yet in the interest of the masses of the people these very rights had to be swept away at a great expense to the people about ninety years afterwards.

The ultimate establishment of French law in Quebec, therefore, we cannot but regard as being really a misfortune for that province;

it was a triumph of the classes over the great mass of the people; it had the effect of perpetuating for the best part of a century the exactions, we may say, indeed, the legal and illegal extortions of the seigniorial system, and delayed the extinguishment of those rights, and increased enormously the price which had to be paid for their redemption. It has set up a bar between Quebec and the other provinces of the Dominion, and it is an obstacle to that growth of homogeneity which is so desirable. The French *habitant* is a religiously disposed individual, and it was a comparatively easy task to pull the wool over his eyes with the cry that his rights would be endangered and his religion sacrificed by the introduction of English law, a law which would probably have sooner relieved him from the compulsory exactions of his seigneur on the one hand, and of his church on the other, and left him a free man to work out his destiny, and to pay for the support of his religion, not by the compulsion of human law, but according to the dictates of a free and enlightened conscience[1].

The struggles which the privileged classes waged for the maintenance of French law were, we think, not in the best interest of the people at large, and though the people of Quebec profess to regard the possession of their peculiar law as a privilege and a boon, we fail to see that they have now any benefit or advantage from it which they would not equally have had under English law. The law of Quebec differs from that of all the other provinces of the Dominion, and puts French Canadian lawyers who seek their fortunes in other provinces at a serious disadvantage, and involves a difficulty in constituting appellate courts which shall be satisfactory to Quebec lawyers; and moreover it has assisted to isolate the French from other Canadians.

The French Canadian law, as Dr. Lemieux points out, is not by any means the same as the French law of the Code Napoléon, though in some important respects it resembles it, both having to some extent a common origin. French Canadian law is founded principally on the *Coutume de Paris* with divers amendments and modifications suited to the necessities of the country. It may, perhaps, be deserving of the encomiums lavished upon it by Dr. Lemieux, but he does not venture to say that it is any more effective than the English law in securing the rights and liberties of the individual. It would indeed be a very interesting study, and one well worth undertaking, to compare the two systems of law with a view to ascertaining the relative merits of each. The law of all civilized people has very much in common, and it should be the aim of scientific jurists to ascertain the comparative merits of each

[1] See note B, p. 191 below.

system, always remembering that the highest aim of all law should be to secure for the public at large, collectively and individually, the utmost liberty of action compatible with good order, and the utmost security for both the person and property of every individual. Here is a field for the Society of Comparative Legislation. Among numerous other pleasant touches of interest, Dr. Lemieux has drawn us an interesting picture of the mode of administering justice by the Superior Court, or 'Parlement de Québec.' The Council in the old French days, it seems, did not hold court seated upon a tribunal as is usually the case nowadays, but they sat round a table in a room at the palace of the Intendant. At the head of the table sat the Governor, with the Bishop of Quebec on his right, and the Intendant on his left. The Attorney-General and the councillors were seated round the table according to seniority of appointment with the exception that the clerical councillor always sat next the bishop. The Attorney-General gave his conclusions seated. The parties and their attorneys stood behind the chairs of the judges and stated their cases; and, strange to say, when the judges were ready to deliver judgment the public and suitors were required to withdraw. There were no advocates, and the attorneys or the parties themselves pleaded their causes; there were also no costs of court. The tribunal sat only as a court of appeal from the inferior courts, and five judges, at least, were required for the determination of civil cases. The execution of the decrees of the council was effected at trifling cost to the suitor.

The council, or 'Parlement,' unlike other French 'Parlements,' had legislative power, and among other ordinances passed by it, Dr. Lemieux says there was one giving a reward to fathers of families who had a certain number of children; what the number was is not stated, and we have not been able to find the ordinance. M. Mercier, a few years ago, during his term of office introduced similar legislation in Quebec (see 53 Vict. c. 26, Q), whereby all parents of twelve living children are entitled to a grant of 100 acres of land. This method of encouraging marriage and the raising of large families we find was recognized by a decree of the French king of April 12, 1670, which provided that a French Canadian who had ten living children, who were neither priests nor 'religious,' i.e. members of religious orders, should be paid an annual pension of 300 livres, and those who had twelve, four hundred livres; and, in order to encourage marriage, the same decree provides that every Canadian youth of twenty years or under, and every Canadian girl of sixteen or under, who marries, shall be paid twenty livres on the day of his or her nuptials.

Under the old French régime, a good deal of the stately grace of

old France found a place in Canada, and minute regulations were laid down by the French king as to the étiquette and order of procedure to be observed by the principal officers in Canada, not only in the state functions, but in the sittings of the superior council, and in processions, secular and religious, and in the attendance at church, and even in the administration of the sacrament of the altar, the particulars of which may be found by the curious in such matters in this work.

Dr. Lemieux discusses at length the much-debated question of whether or not the ordinances, or any of them, of the French king had legal effect in Canada before being registered in the 'Parlement de Québec,' and particularly whether the Marine Ordinance of 1681 was in force in Canada, where it appears never to have been registered, and, though admitting as a general rule that registration was necessary, yet he evidently inclines to the opinion that there were exceptions to this general rule, and that this particular ordinance has, or at all events at one time had, legal force in Quebec, notwithstanding its non-registration; but if in force it is conceded that it must now be subject to the provisions of the Imperial Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60.

In taking leave of Dr. Lemieux and his interesting book, in which we have not found a single dull page, we again very heartily commend it to all who desire information on the subject of which he treats.

GEO. S. HOLMESTED.

The following additional notes (referred to in the text) have been received from the author since the article was put in type:—

A. (See p. 186.)

The following significant remark of M. Cugnet, a French Canadian, possibly conveys a correct idea of the political status of the commonalty of Canada at the time of the cession, and for some years subsequent. Writing in the year 1773, when the question of petitioning for the establishment of a Legislative Assembly for the Province was under discussion, and speaking of the Canadians, he says: 'Accoutumés à obéir et *à être dans l'esclavage*, ils préfèrent à être plutôt arrangés par le Roi et le parlement, qu'à avoir une assemblée dont ils seroient exclus' (see the letter in full, Doutre et Lareau, Hist. Gén. du Droit Canadien, p. 669). To-day their descendants hold the balance of power in Canada, and a French Canadian is Premier of the Dominion, rather a contrast to M. Cugnet's description of their political condition in 1773!

B. (See p. 189.)

Maseres declared that the clergy had taken great pains to get the petition and memorial signed on the strength of which the Quebec Act, 1774, was passed, which two documents were signed by 65 persons (see Doutre et Laréau, Hist. Gén. du Droit Canadien, p. 675). Commenting on the Act, Maseres remarks, 'I daresay many of them [i. e. Canadians] will think they were full as well circumstanced before, where they had a most complete toleration of the manner of worship, but without a compulsive obligation to pay the priests their tythes, as now this Act has been so kind as to impose that obligation on them' (Doutre et Lareau, p. 696).

THE PURPOSE AND METHOD OF A LAW SCHOOL[1].

PART II.

I HAVE tried to show that the scientific study of the Law Reports is the first condition of a sound legal education. Whether it is the only condition is a question which cannot be answered in general terms, for so much depends upon the character of a student's attainments at the period when he enters upon his legal studies. If those attainments are not very much in advance of Matriculation standards—and this is the class of student I have specially in mind—two decisive reasons must be urged for supplementing the scientific study of the Law Reports by certain other studies of a less obviously practical character.

In the first place, higher educational effects can only be realized by the student who takes a broad view of the scope of his work. *Variety* of study is imperative: lest for mental alertness he should display dullness; for open-mindedness, one-sidedness; for enthusiasm, satiety. Highly specialized study has been sometimes spoken of as bad for the *man*, but good for the *expert*. We are now learning that a mind trained to think upon one subject only will never be a sound authority even upon that one. In the second place, knowledge, no less than mind, demands the broader view. Legal rules, like other subjects, require to be regarded from very different points of view if our comprehension of them is to be complete. What Aristotle asserted generally, applies with special truth to law. We must not only analyse an existing content, but must also investigate the principles by which the nature of that content is determined, the processes by which it has developed, and the ends or purposes which it serves and after which its progress is guided. Clearly the study of English case law is primarily and essentially the analysis of an existing content. The student who confines himself to that study has chosen to refuse the aid which may be undoubtedly gained from accounts of the origin and development of law, or from even provisional answers to the philosophical

[1] Being an Inaugural Lecture delivered in the University College of Wales, October 19, 1901.

question which is implied in the second and fourth of the Aristotelian modes, i. e. the investigation of the principles by which the nature of a thing is determined and of the ends to which it is adapted. The value of these supplementary modes of inquiry is implied in the observation of Coke, 'He knoweth not the law who knoweth not the reason thereof.' More recently, and more explicitly, a great American judge has declared that the way to gain a truly liberal view of the law is to get at the bottom of the subject by following the existing body of dogmas to its highest generalization, by discovering how it came to be what it is, and by considering the ends which it serves[1]. The same truth is supported by the common practice of law schools. In all the Universities within the Empire with which I have any acquaintance, such modes of inquiry receive an attention which, if not always ideally proportioned, is at least invariably serious. In France studies in Roman Law, Public Law, Legal History, and Political Economy constitute a very large proportion of the student's work. In Germany the new system of legal education includes courses in the Science of Law, in the history and nature of Roman Private Law, and in the history of German Law. In the law schools of the United States, the theoretical side of law has not received the same amount of consideration. Yet the argument from the United States is perhaps stronger than the examples which I have quoted, for American opinion, always loyal to the importance of the practical side of law studies, seems now disposed to advocate an increasing attention to legal theory. My chief authority for this statement is the Report of the Committee to the American Bar Association which strongly urges that the instruction in American law schools should be more historical and more scientific.

The modes of inquiry to which I have referred have a general value which is wholly beyond question. But before we can assign to them their due place in a complete scheme of law studies we must form an appreciation of the particular reasons upon the validity of which they severally depend. Such an appreciation, if made with special reference to the needs of law students, should save us from the opposite extremes of an exaggerated hope or a merely nominal acquiescence. With your permission, therefore, I propose to state a few facts which may contribute towards this end, although in so doing I shall forsake the Aristotelian classification for one which is more suited to the special character of our subject. I will speak first of the comparative method of investigation, then of the historical, and finally of the scientific or philosophical.

[1] Oliver Wendell Holmes in The Juridical Review, April, 1897, p. 127.

Comparative Law.

'Whoever has not made the acquaintance of a foreign language,' said Goethe, 'knows not the first word of his mother tongue.' The value of the comparative view in legal education would appear to be less clear. While no one will doubt that the view has often helped to promote a right understanding of particular rules or principles, even those schemes of legal education which prescribe the study of a foreign law do not appear to contemplate that the study shall be comparative in the sense that the study of a foreign language must be. In England, for example, although Roman law is generally treated with much thoroughness, it is often completed, examined upon, and dismissed, before the study of English law is attempted. Learned authors and law teachers may employ the comparative method in the study; it is seldom heard of in the class room, and is never seriously practised by the student. If we turn from the schools to the forum, scepticism is more avowed and even ventures to deny the value of the method from any point of view but that of the legislator. 'A lawyer,' it is urged, 'does not know his own law better for wasting his time on someone else's. Possession of property in Roman law under certain conditions confers certain rights. The fact is interesting but not specially helpful to the student of a system in which possession confers other rights under other conditions. The student must know his own law. The knowledge of other laws may be left to legislators who are in search of the ideal. The lawyer has not to make law but to interpret it: he is not concerned with questions of expediency, or of abstract truth; his law is in his books and he has to learn and apply it.'

Whatever be the significance of the practice of the schools, the arguments to which I have referred as suggestive of the forum are based upon the supposition of the absolute uniqueness of our legal system. They suggest something of that insularity of temper which to-day hampers our progress in many directions, and even threatens to destroy our commercial supremacy. In law, as indeed elsewhere, an account of the resemblances and differences between two objects is a certain way to bring out their true meaning. We may not adopt the letter of Goethe's speech and say that a law student who is ignorant of all other systems knows nothing of his own. But the thought within that speech has a real meaning for the student of law as well as of language. To take an example already referred to, the student who learns the rules which go to make up our Law of Possession may be very far from having mastered the subject. For behind those rules is the conception

of Possession itself, which is something distinct from particular rules—something which must be comprehended before those rules can be rightly interpreted—something which it is within the power of comparative analysis to illumine. In law, as elsewhere, the letter kills while the spirit gives life. Comparative study puts new life in the legal formulae with which the student will have to deal in everyday life, and thus gives to him a power of vision which must prove of the highest value when he is called upon to deal with new combinations of facts which have not hitherto been made the subject of legislative or judicial interpretation. The argument, both from this point of view and from that of educational discipline, was forcibly expressed by a late Lord Chief Justice.

'I have heard many men say, and so far as my opinion is worth anything it is true, that an acquaintance with the Code Napoléon, which is to a great extent founded on Roman law, and a different system from our own, was of great advantage to him (Mr. Benjamin); not only was it of great advantage to him in actual practical argument, because it gave a breadth, and grace, and facility of illustration which might have been wanting otherwise, but it gave him a grasp of larger, wider, more general principles[1].'

An English lawyer of to-day who is ignorant of all legal systems but his own, labours under two practical disadvantages which must be added to those which are suggested by a general appreciation of educational ends. In the first place he lives within an empire where all kinds of laws are in force, laws founded on the customs of Normandy, old French law, Roman-Dutch law, Hindu and Mohammedan law, and even an improved form of the Code Napoléon. He may be called upon to apply these laws. Only the other day in the case of *Galliers* v. *Rycroft*[2], on an appeal from Natal, a most interesting discussion took place upon certain texts of the pure Roman law, and of the Roman-Dutch law. In the second place, the increasingly international character of human business and affairs must be peculiarly felt where trade and commerce assume vast proportions. The London lawyer never knows when he may be called upon to advise in cases which demand some knowledge of a continental system. Here also, if he be not practised in the art of passing from law to law, if he cannot feel at home in legal systems very different from his own, he invariably labours under a great disadvantage in comparison with another whose studies have been more comprehensive.

The choice of a system of law for the purposes of comparative study is limited. Inevitably the student has to choose between

[1] Report of the Gresham University Commission, 1894, p. 1006.
[2] [1901] A. C. 130.

the continental codes and that great system with which those codes are historically connected. Unfortunately, the modern codes are not yet accessible to the English student. Even if they were accessible, it is doubtful whether they could be studied to much advantage without some knowledge of the Roman law. On the other hand, Roman law is practicable since it can be studied within the limits of a single volume. Moreover, it displays an unsurpassed mastery of the inter-relation of principle and detail; it throws much light upon the origin of English Jurisprudence, the character of Modern Equity, and the jurisdiction of Ecclesiastical and Admiralty Courts; and finally it offers a means of introducing the student to the knowledge of those principles, notions, and distinctions, which are sometimes made the subject of separate treatment in the science of Jurisprudence. Such advantages are indisputable with the single exception of that last mentioned, with regard to which Professor Holland, while averring that 'an uncodified system of law can be mastered only by the student whose scientific equipment enables him to cut his way through the tangled growth of enactment and precedent,' contends that such an equipment must be found in a formal science of law which is derived by the jurist from a comparison of particular systems. I shall have occasion to refer to the scientific treatment of law at a later stage of my argument. At present I can only express my conviction that the general principles and notions of the law should be studied by the beginner in their application, either in the English or in some other system. Even so they will be abstract enough, being in fact no more to him than a book of travels to some expectant voyager who, from a general description of the land he is about to explore, gains certain vague impressions to which experience is hereafter to give a meaning and a content. The student needs elementary law, not the science of law—a subject which he should not approach until he has made considerable progress in the study of particular systems. This, at least, is my opinion. If it be well founded, Roman law has a special claim upon the law student's attention in affording him an admirable introduction to law studies in general.

The statements which I have just made involve certain practical conclusions. A knowledge of Roman law is not an end in itself. Its chief value consists in the fact that it affords both an introduction to legal study, and an opportunity for comparative analysis. The student will therefore study the system in its developed form. Not anxious to outdo a Roman jurisconsult in the knowledge of Roman legal antiquities, he will be on his guard against devoting an excessive attention to origins and develop-

ment, preferring rather to reserve the exercise of his zeal for the historical method until he has entered upon the field of English law. Moreover, of that part of the Roman system which has an accidental value, for example much of the *jus personarum*, he will content himself with a knowledge which justice must admit to be very elementary. To remember and to accept such limitations is a proof not of idleness but of wisdom. The student will begin therefore with a general survey of Roman law as an actual working system expressing permanent principles. He will afterwards proceed to study certain parts of that system in greater detail alongside of the corresponding branches of English law. Among the text-books which he will find it necessary to read, I may be permitted to mention the second edition of Sohm's Institutes wherein the changes which Roman law has undergone in modern times are explained and illustrated. As the Introduction points out, the practical English lawyer has to take into account, not pure Roman law, but Roman law as adapted to the requirements of the present day.

Before I leave the comparative method, I wish to say one word in defence of a subject whose possibilities in legal education have been strangely ignored. I allude to Comparative Constitutional Law. With such works at hand as those of Burgess, Lowell, Bryce, Bodley, Boutmy, and Borgeaud, it is regrettable that this subject has not received more attention from law students. A comparative study of modern constitutions, apart from the excellence of its discipline, would serve to prepare the way for the study of another and more important subject, with which the student should make himself acquainted at an advanced stage of his work. I allude to the philosophy of law.

Legal History.

The place of the historical method in legal education is a subject about which there is much difference of opinion. While some virtually deny that the method has any practical value at all, others speak in terms of eulogy more suggestive of zeal than of discrimination. While the lawyer, inadequately conscious of his debt to legal historians, is apt to be over sceptical; the law teacher in the full consciousness of what legal historians have done and are doing is perhaps too sanguine. It may contribute towards the solution of the problem if we concentrate attention upon two points; (1) the general value of the historical method, as shown by the results which it has achieved in very different branches of learning; (2) the special dangers and difficulties to which it is subject when employed by a student whose time is limited, and whose purpose is other than the attainment of historical knowledge

as an end in itself. (1) The results which the historical method has gained in the world of thought in general represent the great intellectual achievement of the nineteenth century. During the course of that century the method invaded every department of thought. Men turned from the philosophic question *why* to the historical question *how*. They saw that the latter, if not the only question, was at least primary. The spirit of inquiry achieved its supreme triumphs in natural science, but invaded many domains and assumed various forms. It reformed theology, revolutionized philology, and created sociology. When in literary criticism, Sainte-Beuve laid down that each literary work was a mental result which could only be understood after a study of the character, ancestry, race, country, and intellectual, moral, and social surroundings of the individual who produced it, he was but once more illustrating the modern belief that a product cannot be understood apart from the factors, an effect apart from the cause, the present apart from the past. The same belief has invaded the domain of law, where in fact the connexion between present and past has been seen to be close and indissoluble. The life of law, writes Chief Justice Holmes, is not logic, but experience. If logic were the life of law, we might hope for a complete knowledge from the examination of a present content. But because law is something more than logic, because it is in fact an outcome of compromises which the past alone can explain, we are compelled to study the processes of its development as well as the forms in which it expresses itself to-day. To Savigny belongs the honour of establishing the profound truth of this view by the irresistible logic of example. In his epoch-making treatise on Possession, he showed how much of the later Roman law is unintelligible without the aid which historical inquiry affords. In our own day, happily, we need not go to German texts to learn the power of the new method. In various treatises on the modern law, we are enabled to see how closely the origin and history of legal rules bears upon their meaning for the modern lawyer. In the great work of Pollock and Maitland we may experience, in the studies of our early law, the revelation of a new meaning in our whole legal system. 'It is the boast of some English practitioners, and it may be the boast of some Americans also,' declares a distinguished and practical lawyer, 'that they want to know the law of to-day and do not care to trouble themselves about the law as it was centuries ago. Well, but is not our legal system a system of government of the living by the dead? . . . Once we admit that we have to be guided by authority, we must also admit that we cannot read authority aright unless we can truly estimate the conditions and qualifica-

tions under which alone it can be safely applied. These conditions and qualifications can only be known by going back to the source of the authority, by considering the material or social needs which called it into existence. Take any legal doctrine that has come down to us through the ages, crystallized, perhaps, into a phrase. Nothing is easier than to accept such a phrase as settling a disputed point out of hand, and nothing more dangerous. Half one's time as an advanced practitioner is spent in mastering the limitations of formulae which as students we swallowed whole and retained undigested. When we have tracked a principle home, we find very often that it has to be re-stated, and that when so re-stated it throws quite a different light on the matter in hand, or else (no uncommon discovery) that it has no bearing at all[1].'

(2) What are the special dangers and difficulties to which the historical method is subject when employed by the law student? Very able men may be heard to declare that the mental characteristics of the searcher after historic truth are not the same as those of the lawyer; that historical training, if not kept within very limited bounds, may be fatal to professional success; that the historical lawyer is almost inevitably the victim of antiquarianism; that in nine cases out of ten quicker ways may be found to the meaning of a legal rule than the long and devious path trodden by the historical student; and that in the tenth case the path had best be trodden by a proxy, whose results can be accepted without undergoing the fatigue of repeating his processes. Such criticisms are worthy of a student's consideration. They come of knowledge rather than ignorance, prudence rather than folly. They attack the historical method rather than legal histories, and they attack the method as an element in the education of the student, not as a means for the extension of human knowledge. The lawyer is not called upon to be an historian. A very great part of the argument in defence of the historical method of inquiry is open to the remark that its meaning is for writers of legal treatises rather than for lawyers in the practice of their profession. A wise scheme of preparative study will necessarily take into consideration two very important principles. In the first place a student must inevitably rely much upon the results which others have worked out for him. In the second place, he will never wholly grasp those results unless he takes the trouble to see something of the processes by which they have been gained. A just solution can only be found in the combination of these principles. Zeal may argue that the study of history involves a constant exercise of the faculties in the calculation of doubtful evidence and the weighing of contingent

[1] Law Quarterly Review, xii. 350, article by Montague Crackanthorpe.

probabilities; and that far from being a mere mnemonic exercise, it demands the exercise of just those mental faculties which are used in the everyday business of life, the calculation of doubtful evidence, the weighing of contingent probabilities. But unhappily this sort of discipline is only possible for the student within very narrow limits—limits wisely determined by reference to what is required for the appreciation of the researches of legal historians. Increased knowledge rather than mental discipline is the practicable gain. And increased knowledge of the highest value will reward the student if he will study those accounts of developmental processes which he will find in systematic legal histories or in text-books of the modern law; if he will make some use of original sources of information in dealing with subjects like Real Property where the necessity for historical equipment is more than usually imperative; and lastly, if he will humbly seek to gain in the study of recognized masters something of the quality of historical mindedness, something of the temper which instinctively recognizes what problems demand, and what do not, the sidelight which history can throw upon them.

The Philosophy of Law.

The student who has made a scientific study of case law, and has further examined the rules and principles thus discovered from historical and comparative points of view, has still before him the task of viewing law as a whole, of learning how to interpret legal principles in the light of a wider synthesis. The legal historian seeks to add knowledge, the legal philosopher to give insight: the one deals with laws, the other with law. The philosophic treatment of law seeks to give an interpretation of the subject-matter as a whole which will enable a student to press down to greater depths the comprehension of legal principles already known. I am quite aware that the practical value of such a pursuit is not wholly beyond controversy. 'All who have written of laws,' said Bacon, 'have treated that subject either as philosophers or as lawyers. And the philosophers propound many things beautiful in speech but remote from use. But the lawyers, bound to the pleadings of their own country, or even to those of Roman or pontifical laws, do not use a sincere judgment, but discourse as it were in fetters[1].' The censure is not without truth to-day. While lawyers, all too ready to boast an allegiance to fact when fact means the letter of the law rather than its spirit, affirm that the theory of law is an ornamental study, jurists give some support to this affirmation by

[1] De Augmentis Scientiarum, lib. viii, cap. 3.

writing learned treatises which affect to initiate students into the difficulties of legal classification before they have had any acquaintance with the things that are to be classified. Candour must compel the confession that our philosophy of law has yet to be written. In so far as a student achieves such a philosophy, the result must be largely due to his own efforts, aided by the wisdom and researches of writers of very different schools of thought. The few considerations which I shall venture to urge on this difficult subject are based upon what I conceive to be the drift of present opinion. I shall begin by reviewing, with extreme brevity, the various methods which have been hitherto adopted in the philosophical (or scientific) treatment of law.

We need not tarry long over the school of natural law—a school which attempted to construct, by *a priori* methods, an ideal law of which existing systems were conceived to be very imperfect anticipations. The practical and scientific demerits of the school were closely connected, and have long been commonplaces. Practically, the school threw little light upon the nature of existing law; and the result was largely due to a disposition to build up an ideal system in reliance upon the processes of abstract reasoning from the data of man's social nature, without due regard to the revelation of that nature in history and in existing legal systems. Such a school might afford scope for philosophic genius, but must appear remote from practice. It might help to foretell the future; it could not interpret the present. Partly owing to the character of the English temperament, and partly owing to the bias which certain historical conditions imparted to early attempts at legal philosophy in England, the school has exercised a comparatively slight influence upon English thought. It has indeed become a byword for the unreal and the fanciful. Its fundamental merit consisted in its appreciation of the importance of the end of law as a subject of juristic inquiry: its fundamental demerit in its determination of that end by *a priori* analysis. The school serves to recall the luminous censure in the Advancement of Learning: 'As for the philosophers, they make imaginary laws for imaginary commonwealths, and their discourses are as the stars, which give little light because they are so high[1].'

The method of English jurists is largely *a posteriori*. Their aim is the comparative analysis of the facts of human experience. 'By the help of God,' declared Leibnitz, 'I will some day compile a complete panorama of the law wherein shall be arranged in parallel columns the laws of all nations, of all countries, and of all ages.' Such an ideal appeals to English jurists as infinitely more

[1] Book I, p. 266.

profitable than *a priori* speculation. Attempts to work out the ideal have given rise to two schools. Both of these schools have made use of comparative methods of study; but those methods have been employed by the one school in tracing the origin and development of law, by the other in investigating legal systems at some relatively advanced period of their development. The one has been styled historical, the other analytical. They require to be considered apart; but, for my present purposes, both must be judged by reference to the services which they are capable of rendering to the student of law, and also by reference to what they *have* achieved rather than to what they *might* have achieved.

The analytical school has affected to deal with law from the point of view of the lawyer. Law is looked upon as the creature of the sovereign. Its root idea is force. A rule of law may be bad or good, and may have originated in custom, religion, or legislation. The analytical jurist asks only if it is enforced by the sovereign power. He compares different legal systems with the object of investigating, not the meaning, origin and purpose of law, but the forms which it assumes, the relations which it governs, and the classifications to which it is susceptible. The school has been usually felicitated for penetration, but the expression is not fortunate. By a consistent endeavour to regard law from one very special and obviously abstract point of view, it has undoubtedly helped to give a clearer meaning to certain legal notions, and has facilitated the work of legal classification. Its practical value is displayed in standard text-books, in the art of arrangement, and in clearness of definition. The results suggest logic rather than penetration. Penetration should imply a seeing into the very heart of things, and this is what the analytical school has persistently and avowedly refused to do. By excluding all aspects of law but the one aspect of force, it has achieved useful results which now however demand reconsideration in the light of a wider synthesis—a synthesis which will take full account of the work which is being done by the school of jurists which I am about to consider. Until this has been done, the analytical jurist will be open to the imputation 'of having simplified the juristic problem by evasion of its difficulties.'

The historical school of jurists supplements the historical method by the comparative, and examines the origin and development of law under varying conditions of race and climate. The student of English law, who has learnt what writers like Pollock and Maitland have to say to him on the development of his own system, may be tempted to think of law as an essentially national growth which must be interpreted by the legal historian who

traces its development through the ages rather than by the historical jurist who seeks to construct a theory of universal law. In truth, however, there is room for both historian and jurist; their work is mutually necessary. While no complete theory of universal law can be possible without the material which the legal historian supplies, the value of legal histories largely depends upon the achievement of a point of view which comparative methods alone can give. The joint results of labour in both fields may be seen to-day in the growing influence of Vico's views regarding law. Law, urged that great philosopher, is not the product of individual wills imposing their fiats on States, but the embodiment of the spirit of Nations. Interest and necessity, he contended, are no more than the occasions which awake in men that consciousness of right which is the constitutive principle of social life [1]. To-day we may not accept this view in its entirety, but we at least begin to see something of its truth. Law ceases to be regarded as a mere command of the State: and no analysis of law is held to be satisfactory which does not take account of the spirit which lives within it—a spirit which has not been always the same, but at least has been always something more than the dictates of fear—a spirit in which an increasing rationality becomes ever more and more apparent. 'Law,' writes Mr. Jenks, 'is declared, not made; it is a discovery, a statement of the conditions under which, as wise men have shown, life can be lived, not an arbitrary decree enacting that life shall be lived in a particular way [2].'

This broader view of the subject-matter of juristic philosophy has achieved much, but the services which it has rendered up to the present are but an earnest of those which are to come. As I have already said, our philosophy of law has yet to be written; in the meanwhile the student must anticipate that philosophy as best he can by taking full advantage of the help that various schools afford. In his endeavours, he will probably pay more attention than has been usual in the past to the ends which law serves, the ideas and wants out of which law develops, the economic relations from which it derives its chief meaning. He will lay special emphasis upon the nature and purpose of law as shown by the motives of civil obedience, the justification of civil authority, and the relation of law to morals and politics. He will seek to gain, moreover, some intelligible idea of the evolution of legal systems. His interpretation of law will be primarily sociological—an interpretation sanctioned, in part at least, by every weighty authority. 'I look forward,' writes Chief

[1] v. Flint, Vico, pp. 140 et seq.
[2] Law and Politics in the Middle Ages, p. 302.

Justice Holmes, 'to the time when the part played by history in the explanation of dogma shall be very small, and when, instead of ingenious research, we shall spend our energy on a study of the ends sought to be obtained, and the reason for desiring them. The present divorce between schools of political economy and law seems to me an evidence of how much progress in philosophical study still remains to be made[1].' Further confirmation may be found in the practice of the law schools of France, Germany, Russia, Switzerland, Hungary, Greece, and Japan. 'Les sciences politiques,' said a Professor from Japan at a recent Congress, 'sont l'apanage de la faculté de droit.' 'Les juristes,' said Michel Soboleff at the same Congress, 'doivent être bien au courant de cette science (Political Economy), parce que les normes juridiques touchent principalement les relations économiques variées, l'achat et la vente, le loyer, le fermage, la propriété, etc. Pour appliquer les normes du droit, il est nécessaire de savoir et de comprendre la nature des relations vitales qu'elles règlent[2].' The divorce between the social sciences and law which distinguishes English practice is the more unfortunate because of the highly important part which is taken in the development of our law by judicial conceptions of expediency.

You will infer from what has been said that to see law steadily and see it whole is a somewhat toilsome business. Sociology, ethics, politics, legislation, and political economy suggest a range of studies which is too wide to be within the possibilities of a course of legal study. The law student will say, 'All this is too wonderful for me; I cannot attain unto it.' Probably he will be right. Here, as elsewhere, he may find it necessary to content himself with a compromise. But the challenge to find text-books which will assist him in achieving this compromise is not easily answered. It is not enough that a work should be a good examination manual, for examinations are not the goal towards which a student's efforts are directed; it is not enough that a work should be replete with historical learning, for the knowledge of the law is other than the knowledge of the past; it is not enough that a work should be useful in pregnant suggestions for improving the law, for the student wishes to become a lawyer, not a legislator; it is not even enough that a work should contain many useful suggestions for classifying and arranging the law, for the lawyer is not necessarily a writer of text-books. The practical student seeks rather a work which, without necessarily expounding, im-

[1] Juridical Review, April, 1897, p. 125.

[2] Le Premier Congrès de l'Enseignement des Sciences Sociales, pp. 23, 26, 85, 86, 93, 121, 129.

proving, or classifying the law, shall at least help to explain the law. He seeks some ultimate, or approximately ultimate, analysis of law and legal principle which will give him a deeper, truer insight into existing legal rules. As I have already said, this insight can only be gained by combining the wisdom of very different schools. The student who reads the works of Austin, Bentham, Holland, and Maine does well; but he must not stop there. Apart from Chief Justice Holmes's great work on the Common Law, which I assume to be indispensable, I cannot help feeling that every student should make a thorough and conscientious study of T. H. Green's Principles of Political Obligation. He should, moreover, make frequent references to such works as those of Jenks (Law and Politics in the Middle Ages), Graham (Political Philosophy from Hobbes to Maine), Lightwood (Nature of Positive Law), and Spencer (Sociology). Such a course of reading cannot be judged essential. But it will be useful. A man may be a good lawyer without it. He will be a better lawyer with it. He will learn something more of the reason in the law, the life which moves within it, and the place which it holds in an ordered system of knowledge.

Co-operation.

No discussion of the methods of legal study would be adequate without some reference to the possibilities of co-operative study. Learning however profound, it has been well said, is in law above all places, of little avail without an equivalent of readiness and skill in application. And this readiness and skill can only be gained under conditions of mutual help and criticism. Reading maketh a full man, conference a ready man. A due recognition of this fact will perhaps account for the great results which have been achieved in American Law Schools. In any case the fact itself is wholly beyond question. Students of law will do well, therefore, to take advantage of all the possibilities which lie in the direction of work in common with one another, not only by taking part in Law Moots and Law Debating Societies, but also by forming much smaller groups of three or four for the study of special subjects. That the student should work with a lecturer or tutor goes without saying. But in what way? The question is delicate and debatable. But I may venture to say, without fear of contradiction or offence, that neither lecturer nor tutor should be looked upon as a *vade mecum* for examination purposes. Unhappily, the agreement on this very elementary point is more honoured in theory than in practice. Surely no one can fail to observe or deplore the extent to which we are enslaved in this country by the despotism of

examinations, lecturers and students alike. It might almost be suggested that we work as ever in the Great Examiner's eye. The whole educational system so turns upon examinations as to determine at once what subjects shall be studied and how they shall be treated. Unhappiest of all, the conception of examination itself leaves much to be desired. We cannot wonder if, under such conditions, the student loses sight of educational ends, and allows his ambition to run in the direction of accumulating formulae which he can reproduce with an easy grace and facility when called upon. Or that he is apt to demand lectures which will save him the trouble of mastering his text-books—a saving the most ruinous and prodigal that can be imagined. A student who substitutes attendance at lectures for strenuous work in the study may perhaps pass a badly-conducted examination; he can never make a lawyer. Not even if, in emulation of the student in Goethe's Faust, he should succeed in taking ponderous tomes of lecture notes.

Mephistopheles:—

> 'Five lectures daily you must hear,
> And write away without cessation,
> As at the Holy Ghost's dictation.'

The Student:—

> 'This, Sir, a second time you need not say;
> Your prudent counsel I appreciate quite.
> For what were written down in black and white
> We can in peace and comfort bear away.'

To find fault with one possible relation between lecturer and student is more easy than to define the true relation. That a lecturer should aim at leading his pupil on to right methods of reading, thinking, and study, is of course indisputable. Not less so, that the pupil should be made to experience the feeling of joint interest in the search after truth, rather than be treated as a receptacle into which ready-made truths may be poured. But beyond such general statements it is difficult to go. Candour compels the confession that for the achievement of such purposes as I have suggested there is no absolutely best method, nothing more than a relatively best, which must be determined by reference to the special needs of the student, the personality of the lecturer, the nature of the subject, and the material which is available in the form of library and class rooms. Yet you may be not indisposed to grant me a plenary indulgence if, without presuming to dictate to others, I venture to occupy your time a moment in explaining the method which I have found most generally useful under circumstances which perhaps may be deemed typical. The method implies

a division of the lecturer's work about equally between lectures proper and classes. The time in classes is devoted to oral discussion either of selected cases, or of the ground covered by the students in their answers to an examination paper which has been previously set to them. Obviously, the work of the lecturer on such occasions must be mainly catechetical. He guides discussion, endeavours to promote a general freedom of expression, and confines didactic statement to the briefest possible summary of the results of class discussion. In lectures proper, on the other hand, very considerable differences of method are inevitable. My own ideal has been to aim at securing about one-third of the lecture hour for the delivery of very brief notes in which the subject of study is recast in manual form, another third for free explanation and illustration, and the remainder of the hour for free class examination on the subject of references which have been specially prescribed in the previous lecture with the object of illustrating and enforcing the principles under immediate examination. If such a procedure be well followed —and I know enough of its difficulties to appreciate how much that means—the lecturer is enabled to exercise a continuous directing influence over the student's reading. The student, accustomed to have his private reading submitted to the ordeal of examination in class, learns how to get out of a book what is in it. He enjoys, moreover, an opportunity of exercising himself in the art of replying to objections before an audience.

I hope you will not consider what I have said on the relation of lecturer and student to be inappropriate. Lest, however, you should think it concerns lecturers rather than students, I will venture to remark that the possibilities of high-class work in the lecture-room are very largely dependent upon the students' understanding and sympathetic appreciation of the teacher's aims and methods. Probably few students recognize to how great an extent they determine by their approval or censure the character of the lectures which they attend. Just as a modern censor is apt to complain of the pulpit where he ought to blame the pew, so the critic of the law teacher may overlook the extent to which a teacher's methods must be affected by the demands of the student. If the student wants a *vade mecum* for examination purposes, if he sees no further than the attainment of some academic title or distinction, the lecturer can achieve little. The responsibilities of the student in the matter of successful class work and perhaps even of successful lectures, are fully as great as those of his lecturer. He must know how and when to speak; he must sometimes be patient with his fellow-students, and sometimes mayhap with his lecturer; he must work out of lecture hours as well as within them; he must be active, and

to some degree original, and must know how to draw intellectual nutriment from the active processes of criticism as well as the passive processes of listening. He must care sufficiently for truth to give of his time and energy in the pursuit of her.

Conclusion.

A course of legal study, such as I have submitted for your consideration, cannot fail to develop a special competency. Will it ensure a liberal education? *Is law a great study?* The question invites an expression of certain beliefs which underlie the whole argument of this lecture.

Legal studies, far from affecting to give a conventional culture, presume its possession as a starting-point. But they *do* give a very real culture. 'I do not feel,' declared Lord Bowen, 'that I or anybody like me is sufficiently alive to the great importance of the literary and intellectual side of the law.' 'I have had,' says Lord Davey, 'some experience of the ordinary training of a public school, and of the University of Oxford, the ordinary training of literature, mental and moral science, and mathematics, but I declare that I attach at least equal educational value to the training one gets in applying legal principles to a concrete problem.' The fact that a course of law leads on to a profession is not conclusive against its claims to be considered a good education. On the contrary, law only ceases to be a good education when, by sacrificing the practical side to the theoretical, we attempt to cure an imaginary evil by creating a real one. Unless I am hopelessly at fault in the conclusions which I have expressed in this lecture, the practical side is to the full as educational as the theoretical, and can more easily stand alone. Without wearying you with further arguments than I have already given in defence of this statement I will simply refer to the most conspicuous example which is afforded by the study of case law. In neglecting that study for others more 'academic,' true discipline and practical knowledge alike have suffered. On the other hand, the theoretical side of law studies, historical and comparative methods, will be found to be not less effective as means of mental training when directed to practical ends. In short, when law is studied from both points of view, when theory and practice go hand in hand mutually subservient to a common purpose, the subject is a great study in every worthy sense of the term. If it be an education to develop the faculties of the mind—if it be an education to discipline oneself in a method of strict examination and inquiry, taking nothing on trust, and weighing evidence and opinion in the balance of reason—if it be an education to

learn something of the mental habits which lead a student to rationalize convictions, to analyse the thoughts and opinions which come to him from authority—if these things be education, a student need have little to fear in devoting a whole-hearted and untiring energy to the study of the law. Ignorance or prejudice may think to condemn his knowledge as technical, special, or useful. Let him take comfort in the splendid panegyric of Burke[1], who held law to be one of the first and noblest sciences —'a science which does more than any other to quicken and invigorate the understanding.' We hear much to-day of research, and President Eliot has well said that a University which is not a place of research will not continue to be a good place of teaching. We might add, of learning. The methods of study which I have advocated make of every student a student of research. If he study law in the original sources, he is necessarily a seeker who is forming habits and acquiring methods which may lead to high achievement in after days when he has felt the inspiration which must come to him who, having seen something at first hand of the mighty fabric of the common law, and having reflected upon the long ages which have passed, the great efforts which have been spent, in its construction, has learnt to dwell upon the hope of some day ranking among the humblest of its builders.

The function of a law school is not to make men moral, but to make men capable. Yet the study of the law has a moral as well as an intellectual aspect. 'Some are allured to the trade of the law,' writes Milton, 'grounding their purpose not on the contemplation of justice and equity, but on the thoughts of litigious terms, fat contentions, and flowing fees.' Bacon takes a wider sweep, and indicts the whole world of learning. 'Men learn upon a natural curiosity and inquisitive appetite—to entertain minds with variety and delight—for ornament and reputation —victory of wit and contradiction—time and profession—seldom to give a true account of their gift of reason to the benefit and use of man.' Both Milton and Bacon spoke what they knew, and what time has not altered. The fact remains that, while the object of the law is worthy, both the study and the practice of it may be made so. 'The object of the law,' wrote Sir Edward Fry, 'is one of the noblest to which our nature can aspire, the ascertainment of truth, the promotion of honesty and of righteousness, the repression of crime, of fraud, of injustice[2].' 'We are aware,' said Lord Chief Justice Erle, 'that in the class of advocates, as in every other numerous class, there will be bad men, taking the wages of evil, and therewith also, for the most part, the early

[1] Speech on the American Taxation. [2] Law Quarterly Review, ix. p. 128.

blight that waits upon the servants of evil. We are aware also that there will be many men of ordinary powers, performing ordinary duties, without praise or blame. But the advocate entitled to permanent success must unite high powers of intellect with high principles of duty. His faculties and acquirements are tested by a ceaseless competition proportioned to the prize to be gained, that is, wealth and power and honour without, and active exercise for the best gifts of mind within. He is trusted with interests and privileges and powers almost to an unlimited degree. His client must rely on him at times for fortune and character and life. The law trusts him with a privilege in respect of liberty of speech which is in practice bounded only by his own sense of duty; and he may have to speak upon subjects concerning the deepest interests of social life, and the innermost feelings of the human soul[1].'

In speaking of the object of the law, and the practice of the law, I have referred to the opinions of two lawyers who have also been distinguished judges. I turn to the *study* of the law. If this had not also its moral aspect, it could not be study. Riches and honour the wise man will not despise. They are legitimate ambitions; but alongside of them, the true law student must have something of an artist's love for his work. With him the supremely desirable achievement, with a price above rubies, is success, not necessarily as the world regards it, but as his own heart and conscience regard it. 'No one,' writes Fergusson, 'whose soul is knotted with lust or fear, no prurient glory-seeker, no trap-setter to catch distinction, no one afraid to die in his working clothes as a common man, can be an artist, a man of science, and a civilizer[2].' Nor can he be a lawyer or a true law student. Not, at any rate, in the sense of the words as they would have been used by one who saw that a lawyer is not to be made of kings. If the study of the law demands the highest exercises of the intellectual powers, and if it engages these powers in behalf of one of the noblest objects that man may set before him, the realization of justice, so also it calls for loyalty and devotion, for self-denial, patience, and industry, and, above all, for a persistent and unconquerable honesty. Well and truly spoke the English judge when he said, 'Your Majesty may make judges, but Your Majesty cannot make lawyers.'

W. Jethro Brown.

[1] Quoted Finch, Cases in Contract, Introd.
[2] Fergusson, Religion of Democracy, 159.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Studies in History and Jurisprudence. By JAMES BRYCE, D.C.L. Two Vols. Oxford: At the Clarendon Press. 1901. 8vo. Vol. I, xxii and 553 pp.; Vol. II, xvi and 543 pp. (25*s.* net.)

MR. BRYCE is an excellent representative of a school of writers not too numerous in this country, scientific students of politics and jurisprudence. He is well qualified not only by the nature of his lifelong studies but by reason of his practical acquaintance with affairs. He has held a seat in Parliament for many years and has been able to observe the visible working of the great wheel of the State, was for a few years a member of the Executive Government, and has travelled in pursuit of knowledge in many lands, east and west and south.

Mr. Bryce says in the preface to these two volumes, 'These volumes contain a collection of studies composed at different times over a long series of years. They treat of diverse topics; yet through many of them there runs a common thread, that of a comparison between the history and law of Rome and the history and law of England.'

The essays numbered 1, 2, 3, 11, 12, 14, 15 and 16, bear directly upon the comparison between the Roman and British Empires, and between the Roman and English legal ideas and their development. It is, perhaps, a pity that Mr. Bryce did not make a separate book out of these materials, giving to them more co-ordination and resuming his general results. The other main subject of these essays is the comparison between what Mr. Bryce calls 'flexible' and what he calls 'rigid' political constitutions. This subject is dealt with, or referred to, in essays 3, 4, 7, and 8. The five remaining essays are upon miscellaneous subjects, more or less connected with law and politics.

Mr. Bryce's political comparison between Rome and England is not between the whole of the two imperial systems, but between the whole Roman Empire and the British Indian Empire. His reason is that there was nothing in the Roman Empire corresponding to the great self-governing Colonies. This is true, but in one sense these Colonies recall the Western half of the Roman Empire. Gauls and Spaniards were nearer by nature to Romans, and were a cleaner slate to write upon than were dwellers in Asia Minor, Syria and Egypt. Therefore Roman political and legal ideas took root more firmly in the West than in the East. The enduring work of Rome was done in these countries, as their religious, and legal, and social ideas still testify. If the British Empire were now dissolved the enduring intellectual work of our race would be found in Canada, New Zealand, Australia, and in the United States. In India, in all probability, the spiritual fabric would vanish like a dream, and material embankments, roads, canals and bridges alone testify to the

former existence of Western rulers. The great difference between the two Empires is that Rome was the capital of the whole civilized European world and stood in the midst of her possessions, while England has at her doors several other powerful Western nations, and the nearest important possession of her own is almost 3,000 miles away, and the bulk of her dominions more distant still.

Mr. Bryce works out in a lucid and interesting way the parallel between the Roman and British Indian methods of law and administration. The two races resemble each other in their cool good sense, their distaste for rash action in search of logical completeness or theoretic symmetry, and their toleration of forms and appearances, so long as the substance of power was secure. Again and again in India we have conquered a princedom and incorporated it in the Empire without, strictly speaking, annexing it. If a Roman official at Jerusalem in the year 30 A.D. had been suddenly transferred to the Kashmir Residency in the year 1900, he could have easily understood his own position in relation to the Rajah, the people, the Lieutenant-Governor at Lahore, and the Supreme Government at Calcutta.

Mr. Bryce draws an interesting comparison between the expansion of what may be called Imperial law in the Roman and British Indian Empires. In the latter, native Mohammedan and Hindu law remains entrenched in the fortress of family relations, inheritance, and real property, while English legal principles have gradually covered most of the remaining field. He seems, by the way, to have gathered from his inquiries in India that the Criminal Code, due to the genius of Macaulay, has proved much more useful than the subsequent Contract and Evidence Acts. Certain obvious defects in the Contract Act have been mitigated by the strong presumption of the High Courts that intention to alter the law was to be inferred only from the clearest words; and, though little regarded by High Court judges and practitioners, it is of great use to civilian magistrates.

Questions relating to 'flexible' and 'rigid' constitutions concern the white rather than the brown portion of the King-Emperor's subjects. By a flexible constitution Mr. Bryce means one in which the sovereign—whether monarch or assembly—is, legally, supreme for all purposes. He calls it a rigid constitution where, for fundamental purposes, such as altering the constitution itself, a peculiar process is required before an act can be accomplished, such as a plébiscite, or the securing of an abnormal majority of votes, or a convention specially constituted. Before the American Revolution almost all constitutions were flexible; now, in Mr. Bryce's sense, they are rigid in almost every civilized country except the United Kingdom and Russia. Mr. Bryce shows how this change is connected with the march of democracy, that is to say, the vesting of supreme control in non-experts, and points out that the adoption of a true federal system, as in the United States, Germany, Canada, Australia, necessarily involves a 'rigid' constitution because powers are divided between the Federal and State Governments. There is no reason, be it observed, why the constitution of a State, like Bavaria, Ontario, or New South Wales, should not be 'flexible,' while the whole federation of which it forms a part is governed by a 'rigid' constitution.

Mr. Bryce's essays are of much interest in relation to questions of present importance, and we strongly recommend them to all serious students of history and politics.

Company Precedents. Part I. By F. B. PALMER, assisted by Hon. C. MACNAGHTEN, K.C., and FRANK EVANS. Eighth Edition. London: Stevens & Sons, Lim. 1902. La. 8vo. xcv and 1696 pp. (36*s.*)

THERE are exceptions to the rule *μέγα βιβλίον μέγα κακόν*, and this book is one. Its size, colossal as it is, does but symbolize the extraordinary expansion of joint stock company law and practice during the last forty years, and cannot be said to be disproportionate either to the intrinsic importance of the subject or to the position which 'Company Precedents' has achieved as the leading work on company law. In this domain, despite his many competitors, Mr. Palmer

'Holds solely sovereign sway and masterdom,'

and he does so by reason of his thoroughness, his practical good sense, and his familiarity with the business as well as the legal side of his subject. His introductory observations on prospectuses and on underwriting under the law prior to the Act of 1900 and under that Act are instances of his full and satisfactory treatment of a topic.

Very great pains, the author tells us, have been taken with this edition, and we can well believe it, for Mr. Palmer has had to work the materials of the Companies Act, 1900 into the structure of his former edifice, a task, as every one knows, much more difficult and troublesome than merely building; but to the practitioner this consolidation is great gain: and who can afford to dispense with this aid? £2,000,000,000 of paid-up shares and debenture capital is now invested in trading companies. What a reflection!

The Law of Principal and Agent. By ERIC BLACKWOOD WRIGHT. Second Edition. London: Stevens & Sons, Lim. 1901. 8vo. lxviii and 583 pp. (18*s.*)

MR. WRIGHT is gifted with the power of lucid and accurate exposition; he arranges his subject well and treats it exhaustively; and the result is an excellent book.

We have read several of the chapters with pleasure and profit, and have only come across a few passages calling for adverse comment. Mr. Wright treats the decision in *In re Tiedemann and Ledermann Frères* [1899] 2 Q. B. 66, as creating an exception to the rule illustrated by *Keighley Maxsted & Co.* v. *Durant* [1901] A. C. 240. We fail to see how the principle of either case is an exception to that of the other. In *Keighley Maxsted & Co.* v. *Durant* (by the way we note Mr. Wright spells both names wrongly and does not give the case in his index of cases) the House of Lords decided that 'where a person intending to contract as agent (but without his authority) does not purport to contract as agent, there can be no ratification.' The other case decides that 'where a person not intending to contract as agent does (fraudulently) purport to contract as agent, the principal for whom he purports to contract may ratify.'

Upon the much vexed question of the liability of an agent for the fraud of his principal Mr. Wright is not very happy. In our opinion he expressed the rule more accurately in his first edition than in this. Perhaps if he had had the opportunity of carefully studying Lord Brampton's luminous judgment in *Whitechurch* v. *Cavanagh* (85 L. T. 349) he would have adhered to his former views. He seems to us to confuse liability in an action for deceit with liability in contract by estoppel, causes of action to which different principles apply.

It appears to us that all the cases lay it down clearly that to render a principal liable for the fraud of his agent it must be shown either that the principal authorized the particular transaction which is fraudulent or that the agent was acting (*a*) within the general scope of his employment, and (*b*) for the general or special benefit of the principal. Whether instead of (*b*) it is enough to show that, though the agent was acting for his own benefit only, the principal in fact got the benefit of the fraud, has not yet been decided. Probably it is enough, because the taking of the benefit by the principal would amount to a ratification by him and would bring the case within the rule in *In re Tiedemann and Ledermann Frères.*

Where, however, it is sought to establish the liability of the principal by estoppel it matters not whether the agent in committing the fraud is acting on his own behalf or for the benefit of the principal. It is enough to show that the principal held out the agent as having authority to commit the fraud. On this ground *Shaw* v. *Port Philip, &c. Co.*, 13 Q. B. D. 103, may be sustained.

In *Chapleo* v. *Brunswick Building Co.*, 6 Q. B. D. 696, the directors had expressly authorized the fraudulent representations, so that it was clearly not necessary to show they had derived any benefit from them.

These cases may be regarded as still good law without going so far as to say that a principal is liable in an action for deceit for the fraud of his agent committed within the general scope of the agency but not for the benefit of the principal.

In *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.*, 18 Q. B. D. 714, the Court of Appeal emphatically laid it down that the principal is not liable for the fraud of the agent committed solely for his own benefit. Mr. Wright founds his view on a sentence used by Lord Herschell in giving his judgment in *Thorne* v. *Heard* [1895] A. C. 495, a sentence which may perhaps be somewhat ambiguously or even loosely expressed, but was certainly not intended to be a new statement of the law, overruling a number of earlier cases of acknowledged authority; and, if so intended, was quite unnecessary to the decision of the case before the House.

The Law of Contracts. By EDWARD AVERY HARRIMAN. Second Edition, revised and enlarged. Boston (Mass.): Little, Brown & Co. 1901. 8vo. liv and 410 pp.

THIS extremely ingenious and, for all practical purposes, generally sound book was considered here at some length in its first edition (L. Q. R. xii. 286). Mr. Harriman's speculative opinions are now further developed in appendices. He persists in denying that consent has anything to do with the obligation of contracts, and we persist in regarding this denial as a brilliant exercise in archaic thinking. We are puzzled by the assertion that 'the state not of the intellect but of the will' is looked to by the common law. We never heard of an act of will unaccompanied by at least so much intellect as is needed to define something as willed. The thing willed may be imaginary: the consequences may be wrongly estimated or not estimated at all. These are ulterior questions.

Turning to more everyday matters, it is interesting to see how Mr. Harriman deals with the points in which various American jurisdictions have departed from the common law as received here: for example,

'the doctrine that the so-called beneficiary of a contract may sue upon it.' It is clear that the learned author himself is far from approving of all these novelties, and we do not find from his account that there is any such consensus among the State courts as to warrant the assertion that a distinct American species or variety of the common law is in course of formation.

The Principles of the Law of Evidence. By W. M. Best. Ninth Edition by J. M. Lely. London: Sweet & Maxwell, Lim. xxv and 615 pp. (25*s.*)

A new edition of such a standard work as Best on the Law of Evidence must always be welcome, and the present one is well timed, coming as it does some three years after the passing of the Criminal Evidence Act, 1898. All the principal cases which have been decided under that Act are to be found in the notes, but it is to be regretted that the learned editor does not indicate more clearly the grounds upon which he submits that in the case of *R.* v. *Brazil* (*Law Journal*, March 6, 1899) the prisoner's wife in strict law might have been compelled to give evidence against her husband; under sub-section 2 of section 4 of the Act we are surprised to find no authorities cited to show the cases where the husband or wife of a person charged with an offence may at common law be called as a witness without the consent of that person. A good illustration of this sort of case is to be found in the well-known abduction case of *R.* v. *Wakefield* (2 Lewin C. C. 279), in which Hullock B. explained that in cases of abduction followed by subsequent marriage, whether the marriage was or was not valid, the wife would at common law be a competent witness against her husband.

For practical purposes we are inclined to think that the present editor would have done well to sacrifice part of that portion of the book which deals with the Pentateuch and Quintilian, and to have substituted for it references to some of the more recent decisions on the Law of Evidence, which appear to have been crowded out. For example, we have searched in vain for any reference to the well-known case of *Makin* v. *The Attorney-General of New South Wales* ([1894] A. C. 57), which is now well recognized as the leading authority upon the admissibility upon one charge, of facts tending to show that the defendant has been guilty of similar offences not then under investigation. Book V contains a useful collection of 'leading propositions of the English Law of Evidence' compiled by the present editor. If however the case of *R.* v. *Silverlock* ([1894] 2 Q. B. 766) had been present to his mind he would probably have stated his fiftieth proposition in rather different terms, and we are not aware of the distinction which he seems to draw in propositions 27 and 28 between the proof and the disproof of handwriting by experts. The portion of proposition 12 which deals with perjury is not altogether consistent with proposition 14. The case of *R.* v. *Lillyman* ([1896] 2 Q. B. 197) is another of the chief subjects which has newly engaged the attention of the editor, and on referring to Stephen's Digest of the Law of Evidence, fifth edition, 1899, note v, as directed in the notes on p. 412, we shall find the names of the cases in which Lillyman's case has been considered, viz. *R.* v. *Rowland* (*The Times*, July 6, 1898), *Beatty* v. *Cullingworth* ([1896] 60 J. P. 740), and *R.* v. *Folley* ([1896] 60 J. P. 569). The editor has exercised a wise discretion in retaining the golden rules of Mr. David

Paul Brown for the examination of witnesses, when he discarded the American notes of Mr. Chamberlayne which formed the main feature of the last edition. These rules contain much sound advice, which those just embarking on the study and practice of the law may with advantage read, mark, learn, and inwardly digest. We are unable to deal with the editor's treatment of the Law of Commorientes, to which he draws attention in the preface, as that subject appears to have been omitted from an otherwise excellent index. To sum up, this edition, like its predecessors, should prove invaluable to those who seek not the latest case, but the principles upon which the rules of evidence in this country and elsewhere are founded.

Bailments. By WYATT PAINE. London: Sweet & Maxwell, Lim. 1901. La. 8vo. lxxxvi and 550 pp. (25*s.*)

MR. PAINE has produced a voluminous work upon a difficult subject. He treats of all kinds of bailments as well as a number of other more or less intimately connected topics, such as the law of carriage of passengers, agistment, trespass, distress damage feasant, and the taking of goods in execution. There is a section on trustees, executors, and committees in lunacy, another on bills of sale, several on lien, and appendices of Australasian and Indian cases. A treatise on such a variety of matters needs most careful arrangement, but unfortunately Mr. Paine's work seems to be quite devoid of system. And in addition the style is loose and the statements of the law are in many instances not borne out by the authorities.

A book of this scope if well done might have been of great value, and we cannot but regret that Mr. Paine did not spend in addition to the 'several years of study and research' which its preparation has occupied, another year or two in arranging, revising, excising and verifying his notes.

The work falls primarily into four divisions of gratuitous bailments, bailments for valuable consideration, carriers, and carriers of passengers, with sub-headings of the well-recognized classes of bailments. But under these sub-headings appear all sorts of miscellaneous matters.

For instance, the recovery of fees by barristers and by medical men is dealt with under 'mandate,' and the principle illustrated by *Carlill* v. *Carbolic Smoke Ball Co.* is treated of under 'lien,' though we fail to see what it has to do with bailments generally or lien in particular. Matters affecting bailments generally, such as larceny by a bailee, termination of the contract, and estoppel of a bailee from denying the bailor's title, are included in the section dealing with some particular kind of bailment as though they had no application to other bailments, and it is often difficult to see whether they are meant to apply generally or only to the particular species of bailment in whose section they occur. Happily, however, there is a good index to help one through the maze.

Of the many misreadings of authorities which we have noticed the following will serve as examples. From the decision of the *Mediana* (to which the only reference given in the note is the Law Times Report of the case in the Court of Appeal, though the case was heard in the House of Lords nearly two years ago and is reported in [1900] A. C. 113) is deduced the proposition that 'if a person has temporarily *to hire* a horse to take the place of another horse, or another machine [*sic*], which has

been injured by the negligence of the tort-feasor, he is entitled to recover from the wrongdoer, as special damages, the actual sum expended by him in the hire of a substitute in addition to the amount of the loss which he has sustained through the depreciation of his property.' This proposition would hardly require the authority of the Court of Appeal, though the author himself in the preceding sentence states the exact contrary on the authority of an old nisi prius decision, apparently without noticing the contradiction. The point of the *Mediana* was that the plaintiffs did not hire a lightship in substitution for the damaged one, but used one they kept in reserve.

We are told that when the driver of a hackney carriage loses or injures the luggage of a passenger by letting it fall off the cab during the course of his journey the proprietor of the vehicle *and not the driver* is immediately responsible for the loss. This is carrying the doctrine of *respondeat superior* to a length hitherto unheard of. No doubt it is a wise counsel of prudence that 'in all cases of negligence the action should be brought against the proprietor,' but we know of no rule of law by which the negligent driver is relieved of liability.

It is said that the reputed ownership section of the Bankruptcy Act 'applies exclusively to goods appropriated to the private use of the hirer, and *not* to property in his possession, order or disposition in the way of his trade or business'!

No attempt is made to weigh authorities or to reconcile or explain those that are at variance. Obiter dicta, nisi prius decisions and judgments of the Court of Appeal are all set down as of equal authority, and the notes give no warning as to which of these is the source of inspiration.

Thus by collecting together a number of decisions of the English, Canadian and American courts and various dicta of judges the author has made out, and lays down as law, a delightful list of articles which are, and are not, respectively, passengers' luggage. It is instructive to know that toys are, but rocking horses are not; duelling pistols are, but concertinas are not; an artist's easels are, but his sketches are not, passengers' luggage.

We are told in one place that in an action for damages for loss of the subject-matter of the bailment the plaintiff must give positive evidence of the negligence which he alleges, and elsewhere that the loss shifts 'the burden of refutation' on to the defendant.

And even the dicta relied on are not always correctly quoted. Thus in a somewhat irrelevant quotation from an American case (*Dolph* v. *Ferris*) to the effect that the owner of a bull is liable if it breaks into an enclosure and gores a horse (an action of trespass, by the way, though from the context one would suppose it had something to do with the contract of agistment), the author chances to select for quotation the same passage which is quoted in the argument of a case in the Law Reports, to which he also refers. And, curiously, the same misquotation occurs both in the Law Reports and in Mr. Paine's book. Happily the misquotation does not materially affect the sense.

We cannot but regret that the trouble which the author must have taken in collecting a large amount of information on sundry topics has not resulted in a better book.

The Law relating to Factories and Workshops. By WILLIAM BOWSTEAD. London: Sweet & Maxwell, Lim. 1901. 8vo. xxvi and 343 pp. (9*s.*)

The Law relating to Workmen's Compensation. By WILLIAM BOWSTEAD. London: Sweet & Maxwell, Lim. 1901. 8vo. xviii and 313 pp. (10*s.*)

THE first of these two volumes contains the Factory and Workshop Act, 1901, with an introduction, notes on the sections, and a full index. In the appendices are printed several other Acts relating to factories, such as the Truck Acts, Shop Hours Acts, and portions of the Elementary Education Acts.

Considering the bulk of the Acts now consolidated in the Act of 1901, the number of cases decided on them is remarkably small. Mr. Bowstead has only referred to about fifty (and we have not noticed any omissions)—a number which is in startling contrast with the enormous number of decisions upon the Workmen's Compensation Act, 1897.

In the companion volume the text of the Workmen's Compensation Acts, 1897 and 1900, is set out and elaborately annotated, and there are appendices containing rules and forms of the Employer's Liability Act, 1880.

The two volumes together form an admirable handbook of the law relating to factories. The notes throughout seem to have been written with care and judgment and leave nothing to be desired. We could wish there were a comparative table showing readily the relation between the Factory and Workshops Act, 1901, and the earlier repealed Acts. It is often necessary to compare the language of a consolidating Act with the language of the Acts it repeals in order to ascertain its meaning or the effect on the consolidating Act of a decision upon the earlier Act, and a table facilitating reference for such comparison would have been very useful. Another improvement we would suggest is that the text of the Workmen's Compensation Act, 1897, should have been printed continuously in some part of the book. The notes are necessarily so lengthy that the Act itself gets almost lost among them, and one cannot readily turn from one section to another without a search. Thus there are about thirteen pages of notes between sub-s. 1 and sub-s. 2 of the Act. Subject to these small defects we have nothing but praise for Mr. Bowstead's work.

The Income Tax Acts, with introduction, notes, and cross-references. By H. ST. GEORGE PEACOCK, assisted by ROLLO F. GRAHAM CAMPBELL. London: Sweet & Maxwell, Lim. 1901. La. 8vo. xlviii and 313 pp. (15*s.*)

THIS is a rather disappointing book. It is not indeed without merits. It is admirably printed; it contains copies of the latest enactments bearing on income tax and also cases later than those to be found in the last edition of Dowell's Income Tax Laws. But we cannot say that it otherwise adds materially to our knowledge.

The law of income tax presents some curious speculative problems, as, for instance, the very difficult inquiry, what is the principle, if any, which fixes the limits of taxation in respect of income tax? The matter is treated of, we will not undertake to say solved, in Mr. Dicey's Conflict

of Laws, but the topic is one which to our great disappointment has not apparently attracted Mr. Peacock's attention. Partly, we conjecture, from his not having faced this speculative difficulty, his treatment of such a case as *Gilbertson* v. *Fergusson*, 7 Q. B. Div. 562, with which should be read *Attorney-General* v. *Alexander* (1874) L. R. 10 Ex. 20, is inadequate, we had almost said misleading. His account of the case certainly does not make clear the real point as stated by Bramwell L.J., p. 565, namely that the Crown claimed to tax the English profits, i. e. profits made by English business, to whomsoever they are paid, and to tax the profits made at Constantinople in so far as they were paid to English subjects or rather to persons resident in the United Kingdom, and that this claim of the Crown was made good. No doubt Mr. Peacock followed the account of the judgment given in the headnote of the Law Reports. The note is not clear and hardly brings out the real bearing of the case. To put the matter shortly, Mr. Peacock's work is equivalent, but not more than equivalent to a later edition of Dowell. A critic who had expected new light on a difficult topic cannot refrain from expressing some disappointment.

The Law relating to the Reconstruction and Amalgamation of Joint Stock Companies. By PAUL FREDERICK SIMONSON. London: Effingham Wilson; Sweet & Maxwell, Lim. 1902. La. 8vo. xvi and 174 pp. (10*s.* 6*d.*)

IN the first of his seven chapters Mr. Simonson endeavours to show his readers the meaning of the terms 'reconstruction' and 'amalgamation,' and in support of his conclusions refers to several well-known text-writers and some reported cases. 'Reconstruction,' as he points out, is not a technical term, and his conclusion from the authorities referred to—'that a transfer of the assets and liabilities of a company is called a reconstruction where such transfer is made by *one* company to a *new* company, which is formed for the purpose of taking such transfer and which is practically the same company as the transferring company with some alteration in its constitution, in consideration of shares in such new company, which are allotted or at least offered to the members of the old company'—is true. This statement of the author, however, gives only an example and cannot be regarded as a definition. If the assets and liabilities were transferred to two new companies, the term 'reconstruction' would not be inapplicable. Then, the consideration for the transfer need not be shares; it may be 'shares, policies, or other like interests' (see s. 161 of the Companies Act, 1862).

Mr. Simonson also says that '"reconstruction" is sometimes used in a secondary sense as meaning an arrangement made by a company which is in liquidation with its creditors or members with the sanction of the court under the provisions of the Joint Stock Companies Arrangement Act, 1870.' Surely, to this sentence should be added the words 'provided the scheme sanctioned involves the formation of a new company to which the assets with or without an exception are to be transferred.' Many schemes of arrangement under the Act of 1870 do not contemplate the formation of any new company.

The primary meaning of reconstruction, roughly speaking, seems to be such a transaction as is contemplated by s. 161 of the Act of 1862 (not being an amalgamation), where a new company is to be formed.

The term 'reconstruction' also includes (*a*) a sale for shares, &c., to a new company, not under s. 161, but under a special power in the memorandum of association, and, although the word is not often used in that sense, (*b*) a scheme under the Act of 1870, where there is to be a transfer to a new company.

So much for reconstruction.

As regards the meaning of 'amalgamation' Mr. Simonson, after quoting several text-writers whose very much differing definitions of the term he does not criticize, quotes the description of 'amalgamation' given in the seventh edition of Palmer's Company Precedents, and, on the authority of a passage in Lord Justice Lindley's judgment in *Wall* v. *London, &c. Assets Co.* [1898] 2 Ch. 469, 479, objects to the description so far as it includes a transfer merely of 'some part of the assets and liabilities' of the transferring company or companies. In the first place, it is extremely improbable that Lord Justice Lindley meant that a transaction could not be an amalgamation unless every rag of the company was transferred. If he did mean that, and if what he said is correct, very few amalgamations have taken place up to now. In very many cases something is excepted from the transfer, e. g. cash at the bank, book debts, or assets of a doubtful or peculiar value.

As a matter of fact, Mr. Palmer in his eighth edition has substituted the words 'with or without exception' for the words 'all or some part' (of the assets and liabilities). This is a graceful verbal concession to Lord Lindley, but whether it indicates a change of opinion is more than doubtful.

But the criticism of criticism is an unprofitable task. Mr. Simonson says that 'reconstruction' is not a technical term and has not acquired a very precise meaning, and that 'amalgamation,' not being a term of art, has not as yet acquired an accurate technical meaning, and on the assumption that the latter term only includes the case of the transfer of 'the assets of liabilities' as a whole, he proceeds to tell the profession how to bring about both reconstruction and amalgamation, and he gives in his appendix forty forms for use in carrying out these operations. It must be admitted that in these forms the author stands to his guns and does not show any approval of excepting anything from the transfer of assets on an amalgamation.

Procedure of the Supreme Court relating to Firms, Companies, and Societies. By R. E. Ross. London: Sweet & Maxwell, Lim. 1902. La. 8vo. xxxii and 175 pp. (*6s.*)

THE above is only the short title of the work, which relates to the procedure not only as to firms but also as to corporations proper, companies incorporated by special Act, registered companies, companies formed by letters patent, cost-book mining companies, foreign companies, building, friendly, industrial and provident, literary and scientific and loan societies, clubs, charitable institutions and trade unions. Almost wherever several persons are gathered together under whatsoever name, either as a partnership, a society or a corporate entity, and proceedings have to be taken by or against them, Mr. Ross's book tells the practitioner in a very convenient form how to go to work. Order XLVIII A of the Rules of the Supreme Court contains eleven rules relating to actions by and against 'firms and [also] persons carrying on business in names other than their own,' and there are other Rules of the Supreme Court, although

not many, which specially refer to companies and corporations; but, as Mr. Ross states, there is no code similar to that contained in Order XLVIII A 'which relates either to companies or societies generally, or even to particular kinds of such associations.' He has collected and well arranged the sections of statutes referring to the particular kinds of such associations and dealing with procedure, the Rules referring to firms and to associations of various kinds, and the decisions on the sections and rules. The book will be found most useful in practice, and the fact that Mr. Ross belongs to the Central Office, Royal Courts of Justice, is in itself almost a guarantee that the author is well acquainted with the subject of his work.

Leading Cases in Modern Equity. By the late THOMAS BRETT. Fourth Edition by JOHN DAVENPORT ROGERS. London: William Clowes & Sons, Lim. 1902. lxxxiv and 453 pp. (17*s.* 6*d.*)

THE third edition of this book was brought out in 1896 by the present editor and Mr. J. A. Dixon, some years after the death of the author, and the original plan of the book was then altered by them and improved by a systematic arrangement of the leading cases included, which were grouped and arranged in order under the principal heads of Equitable Jurisdiction: viz. Trusts, Mortgages, Administration, Specific Performance, and Injunction, and at the same time a large additional number of references to minor cases were inserted in that edition.

This new edition retains the improvement thus introduced, and the framework of the book accordingly now remains almost unaltered, but it has been found necessary to insert a further large number of references to new cases decided since 1896, and the result of these successive additions is that the fourth edition cites and incorporates nearly three times as many minor cases as were referred to in the original work, and the book which was primarily intended for the assistance of students has now acquired an extended scope, which justifies the editor's anticipation that it should also be of use to practising lawyers.

The new cases thus introduced are well digested and incorporated with the earlier notes which are thus brought up to date, and the references thus supplied will enable the practising lawyer to turn at once to the latest authority on any point of equity referred to in the table of leading cases.

There are few law books of such modest proportions which contain such an extensive and varied digest of equity case law, but it may be doubted whether the attempt to supply the educational wants of students and the requirements of practising lawyers over so large a field of equity, can be usefully combined in so small a compass, for students would expect and require a fuller statement and discussion of the selected leading cases than the book at present affords.

The Elements of Company Law. By F. GORE-BROWNE. London: Jordan & Sons, Lim. 1901. 8vo. 206 pp. (2*s.* 6*d.* net.)

A Handy Book on Joint Stock Companies. Twenty-fourth Edition. By F. GORE-BROWNE and WILLIAM JORDAN. London: Jordan & Sons, Lim. 1902. 8vo. xxxvi and 580 pp. (5*s.* net.)

The Companies Acts. Third Edition. By A. GLYNNE-JONES. London: Jordan & Sons, Lim. 1902. 8vo. viii and 519 pp. (5*s.* net.)

THE above are three of the useful and moderately priced little handy books published by Messrs. Jordan & Sons, Limited. The first named

book contains the substance of some lectures delivered by Mr. Gore-Browne in 1900 and 1901 before the Institute of Secretaries; and secretaries of companies, who do not speedily become acquainted with at least the elements of company law, are likely to land themselves and others in serious difficulties. In the introduction Mr. Gore-Browne expresses the hope, which we trust may be realized, that his exposition of the elements may be useful also to directors, shareholders, and students.

The Handy Book on Joint Stock Companies is too well known to require any description; and the fact that it has reached a twenty-fourth edition is strong evidence that the work is appreciated by a large circle of readers. No one will quarrel with the authors' statement that sect. 14 of the Companies Act, 1900, which relates to the registration of debentures 'is extremely difficult to work and requires early amendment,' but, as regards another statement in the preface, it must be said that whatever complaints business men may make 'as to the uncertainty which surrounds the question of what are issues to the public and what are not, and in particular how reconstructions are to be treated,' there is not, we believe, a great difference of opinion amongst company lawyers on this head. The expression 'private company' was pretty well known before the Act of 1900 was thought of, and working from the pre-existing definitions of the term it is not, it is submitted, difficult to arrive at what the Act means by 'an invitation' by a company 'to the public to subscribe for its shares,' or an offer of share capital of a company to the public.

The thirdly named book is edited for the first time by Mr. A. Glynne-Jones, who, with characteristic modesty, places his only preface on the title page, whereon he describes the volume as 'The Companies Acts, 1862 to 1900, and other statutes and statutory enactments relating to or affecting joint stock companies formed under the above Acts, with cross references and a full analytical index.' The index is pretty full and is framed on the analytical method, and so far as we have tested it is satisfactory. Mr. Glynne-Jones has had to deal with the Companies Act, 1900, without the assistance of the notes of any previous editor of the book, and his notes on it, though short, are to the point. The book is a cheap and very handy collection of statutes relating to companies, and the fact that the notes are not very long or very numerous is a distinct advantage in a handy book.

A Compendium of the Law of Prescription in Ceylon. By E. S. W. Senathiraja, Advocate of the Supreme Court of Ceylon. Colombo. 1901. 8vo. xxxiii and 96 pp.

This little volume is a summary of lectures delivered by the author to law students in Ceylon. He expresses a hope that the work may prove 'to be of some use even to the practitioner.' Its scope seems restricted to matters touching Limitations of Actions. Prescription in relation to Easements or Servitudes, Rights to Light, Rights of Way, &c., is not included.

A most important attribute of law is certainty. In Ceylon an unhappy element of uncertainty and confusion has existed in lingering and indefinite vestiges of Roman-Dutch law—a system of law which, however suitable it may be in dependencies such as the Cape Colony or Natal, is as out of place in Ceylon as it would be in India. The history of the matter is curious. At the close of the eighteenth century the Dutch owned

factories on the Ceylon sea-board, which they had held for more than 100 years, and in which they had introduced their own Roman-Dutch law. In 1796 those possessions were ceded to Great Britain, and the Dutchmen soon quitted the island. Dutch rule had not reached far inland, and the greater part of the country had as yet known no European rulers. In 1815 the whole island became British territory. Thereafter the country was opened up, and became the seat of a large commerce and a great planting industry.

Well would it have been if, when the Dutchmen departed, their Roman-Dutch law had been lifted from the maritime settlements and replaced by law better suited to the native inhabitants and the British incomers. This was not done. On the contrary, by a singular and unfortunate evolution, the Roman-Dutch law came to be treated as in force even in the interior and in districts where never Dutchman set foot. The situation would indeed have been intolerable had not matters been from time to time patched up by the introduction of British or British-made law in various departments.

The author of this volume observes, and with truth, that 'two different systems of law, the Roman-Dutch law and the English law, have been mixed together . . . without a comprehensive plan.' So far as concerns prescription, the Legislature—now many years ago—lifted the Roman-Dutch incubus. Curiously, however, the author devotes a considerable part of his volume to Roman-Dutch law, disquisitions on doctrines of Civil and Roman-Dutch law, references to Pothier, Voet, Grotius or Justinian, and allusions to topics such as Quiritarian ownership, *Res mancipi* or *nec mancipi*, the *Actio Publiciana*, the God Terminus, and the like.

The volume can hardly be said to be cast in the mould of a work adapted to the needs of the practising lawyer. Its arrangement is not very happy. The book is divided into Preface, Introduction, Contents, Appendix of Legislation, and Index, in addition to the main text, each of these being separately paged. The Introduction and the main text cover much the same ground. There is no Table of Cases, but a few decisions are incorporated in the Index. In some other respects also the Index is curious; witness, for instance, such entries as:—

D.—Does Institution of a suit merely suspend the running of Prescription till the suit is decided?

T.—Twofold meaning of the term Prescription.

W.—When a defendant is entitled to a decree.

Unhappily also the printers' errors, usually numerous where native compositors are employed, have on many pages been left uncorrected, so that some paragraphs are hardly intelligible.

The author has evidently a considerable affection for incidents of Roman-Dutch law, now bygone so far as Ceylon is concerned. Some of the changes made he thinks to have been 'at variance not only with the maxims of jurisprudence, but also with the fundamental principles of the science of ethics.' He strongly disapproves, for instance, of a modern rule, peremptorily barring an action to recover possession of property unless commenced within a statutory period. He hankers after doctrines of Roman and Roman-Dutch law under which plaintiffs could go beyond the limits of the prescriptive term, under colour of allegation as to wrongful origin of defendants' possession, and—with, at all events, the courage of his opinion—discusses 'the *ratio decidendi* in all its naked hideousness'—(does he know that he is quoting from the immortal biography of Chunder Mookerjee?)—as appearing in a judgment of a late

Chief Justice. Those, however, who are acquainted with the characteristics of Oriental litigation will be disposed to prefer the peremptory rule.

Die Römer im Kampfe um den Besitz. Von Ernst Hein. Königsberg: Hartungsche Buchdruckerei. 1901. 8vo. 40 pp.

This pamphlet of forty pages is prefaced with the promise that it gives to science the key to the comprehension of the Roman principle of *possessio*, and opens with a parable which exhibits the circumstances and the motives which led to the evolution of this idea. The parable is renewed in highly dramatic form at intervals throughout the work, and gives a vivid presentation of relations which, in terms of sober juristic fact, may thus be stated. Ownership (*dominium*) is primary; but it remains a crude, inexpansive conception, not applicable to the serious problems presented by the separation of the object from the subject of ownership. Hence a confusion in legal relations which leads to the recognition of *usucapio*. The possessory interdicts are an outcome of public, not of private law, and have the preservation of order as their leading motive. They do not, however, secure this object, for until a late period of Roman law no penalty is imposed for the disturbance of possession, and violence was indirectly encouraged by the interdicts themselves. The interdict is not in itself an action for recovery but a very imperfect mode of leading up to such an action. Rome, it is concluded, had no true 'Sachenrecht.' The author has not touched on the question how actions came to be given for that precarious possession which never can become ownership: and the investigation of the various modes of quasi-possession evolved by the praetor does not come within the scope of his work.

We have also received:—

Stone's Justices' Manual, being the Yearly Justices' Practice for 1902. Thirty-fourth Edition. Edited by J. R. Roberts. London: Shaw & Sons; Butterworth & Co. 1902. 8vo. lxxi and 1166 pp. (25*s.*)—Stone's Justices' Manual is the 'White Book' of all concerned in magisterial duties. Owing to the death of Mr. Kennett, who had been responsible for the work since 1876, the book now appears under new editorship. New cases, new statutes, and new notes have been added, but the work remains substantially as before. The editor expresses the hope that in future editions it may be possible to reduce the bulk of the book. Most practitioners would be grateful for what Mr. Roberts calls 'judicious compression.' The tendency of nearly all legal annuals is to grow to unmanageable bulk by almost imperceptible yearly additions.

State Trials, political and social. Selected and edited by H. L. Stephen. Second Series. Vols. III and IV. London: Duckworth & Co. 1902. 8vo. Vol. III, x and 328 pp., Vol. IV, 284 pp. (5*s.* net.)—These fascinating little volumes contain the trials of:—*The Earl of Essex*, 1600; *Captain Lee*, 1600; *John Perry*, 1600; *Robert Green and others*; *Count Coningsmark and others*, 1682; *Robert Fielding*; *The Annesley Cas*, 1743; *William Jackson and others*, 1748; *M'Daniel and others*, 1755; *William Barnard*, 1758; *Lord Byron*, 1765. All the trials are taken from Howell with the exception of that of the *Earl of Essex*, which comes from an unpublished MS. The volumes will appeal equally to lawyers and to laymen.

Revue de droit international. . . . Tokio. No. 1.—A prefatory note and table of contents in French, and a short paper in English by Prof. Takahashi on the question whether the master of a captured neutral vessel is bound to assist in navigating her to the nearest port of adjudication, are the only portions of this new review accessible to ordinary Western readers. We must therefore be content to wish it success in general terms.

Lectures on Slavonic Law, being the Ilchester Lectures for the year 1900. By FEODOR SIGEL. London: Henry Frowde. New York: Oxford University Press, American Branch. 1902. 8vo. vi and 152 pp.

A Treatise on International Public Law. By HANNIS TAYLOR. London: Sweet & Maxwell, Lim. 1902. La. 8vo. lxxvi and 912 pp. (30*s.* net.)—Review will follow.

The Annual County Courts Practice, 1902. Edited by His Honour WILLIAM CECIL SMYLY, K.C., assisted by WILLIAM JAMES BROOKS. Two Vols. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1902. 8vo. Vol. I, xxxiv, 1028 and 115 pp.; Vol. II, xv, 523 and 55 pp. (25*s.*)

The Factory Acts. By the late ALEXANDER REDGRAVE, C.B. Eighth Edition. By H. S. SCRIVENER and C. F. LLOYD. London: Shaw & Sons; Butterworth & Co. 1902. 8vo. lvi, 352 and 54 pp.

The Yearly County Courts Practice, 1902. By G. PITT LEWIS, K.C., Sir C. ARNOLD WHITE, and ARCHIBALD READ, with a chapter on Costs and Precedents of Costs by MOSTEN TURNER. Two Vols. Vol. I, General Jurisdiction and Jurisdiction in Admiralty, with Rules and Forms. Vol. II, Enactments conferring special Jurisdiction upon the County Courts. London: Butterworth & Co.; Shaw & Sons. 1902. 8vo. Vol. I, xciii and 976 pp.; Vol. II, xxviii and 584 pp. (25*s.*)

The Workmen's Compensation Acts, 1897 *and* 1900. By ALBERT PARSONS and ANTON BERTRAM. Second Edition. 1902. 8vo. xxvii and 215 pp. (7*s.* 6*d.*)

A contribution to an English Translation of Voet's Commentary on the Pandects, comprising all the titles on Purchase and Sale, Letting and Hiring, Mortgages, Evictions, Warranty, and allied subjects. By T. BERWICK, with notes by the translator. New and Revised Edition. London: Stevens & Haynes. 1902. 8vo. xvii and 557 pp. (24*s.* 6*d.* net.)

A Manual of the Principles of Equity. By JOHN INDERMAUR. Fifth Edition. London: Geo. Barber. 1902. 8vo. xxxii and 574 pp. (20*s.*)

Principes de droit constitutionnel. Par V. E. ORLANDO. Nouvelle édition, revue et corrigée par l'auteur. Tr. de l'Italien par S. BOUYSSY. Sous la direction de J. BRISSAUD et avec notes de J. TIMBAL. Paris: Albert Fontemoing. 1902. 8vo. xv and 498 pp.

The Law and Practice relating to Patents, Trade Marks and Designs, with a Digest of Colonial and Foreign Patent Laws. By DAVID FULTON. London: Jordan & Sons, Lim. 1902. 8vo. lxxx and 750 pp. (15*s.*)

Conditions of Contract relating to Building Works. By FRANK W. MACEY. Revised as to strictly legal matter by B. J. LEVERSON. London: Sweet & Maxwell, Lim.; B. T. Batsford. 1902. La. 8vo. xix and 278 pp.

The Law of Factories and Workshops as codified and amended by the Factory and Workshop Act, 1901. By A. H. RUEGG, K.C. and LEONARD MOSSOP. London: Stevens & Sons, Lim. 1902. 8vo. xl and 573 pp. (12*s.* 6*d.*)

Chitty's Forms of Civil Proceedings in the King's Bench Division of the High Court of Justice. Thirteenth Edition. By THOMAS WILLES CHITTY, HERBERT CHITTY, and P. E. VIZARD. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1902. La. 8vo. xxvii and 935 pp. (36*s.*)

The Solicitor's Clerk, Part II, embracing Magisterial and Criminal Law, Licensing, Bankruptcy Accounts, &c. By CHARLES JONES. Third Edition, revised and enlarged. London: Effingham Wilson. 1902. 8vo. xi and 249 pp.

The Yearly Digest of Reported Cases for the year 1901. Edited by EDWARD BEAL. London: Butterworth & Co. 1902. La. 8vo. lxxii pp. and 512 columns. (15*s.*)

The Annual Digest of all the reported decisions of the Superior Courts, 1901. By JOHN MEWS. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1902. La. 8vo. xv and 361 pp. (15*s.*)

Light Railways Procedure Reports and Precedents. By J. STEWART OXLEY. London: Jordan & Sons, Lim.; W. Hay Fielding. 1901. liv and 423 pp. (17*s.* 6*d.* net.)

Select Pleas, Starrs, and other records from the Rolls of the Exchequer of the Jews, A. D. 1220–1284. Edited for the Selden Society by J. M. RIGG. London: Bernard Quaritch. 1902. 4to. lxi and 152 pp.

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.

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NOTES.

THE practice of giving certifications on transfers of shares has grown up to meet the exigencies of Stock Exchange transactions. In the ordinary course of dealing the seller hands over his transfer with the share certificate in exchange for the purchase-money; but it constantly happens that the share certificate includes more shares than those which are being sold. When this is the case the usage is for the seller to lodge the certificate with the company, and to get the secretary to indorse on the transfer a memorandum stating that a certificate including the shares mentioned in the transfer has been lodged. A certification of this kind is not a warranty of the seller's title, but it is accepted by the rules of the London Stock Exchange as good delivery of the shares without the certificate, and as it is a company's interest to facilitate dealings by its shareholders with their shares the practice of certifying transfers is well recognized as incidental to a company's business and within the competence of the secretary. If he certifies untruly the company may be estopped from disputing his representation, *Bishop* v. *Balkis Consolidated Co.* (25 Q. B. D. 512), *In re Concessions Trust* [1896] 2 Ch. 757. The House of Lords has now had to consider in *George Whitechurch, Lim.* v. *Cavanagh* [1902] A.C. 117, 71 L. J. K. B. 400, the extraordinary case of a secretary giving a certification not merely erroneous, but wholly false and fraudulent. Nothing had been lodged at all, and the secretary 'lied purposely' in the interest of another person whom he was serving, and not in the real or supposed interest of the company. Thus he was acting not in the course of his employment, so as to bind the company for wrongs committed in the course of that employment, but in a way of 'deliberate fraud utterly unconnected with the course of his duty as secretary' (per Lord Brampton [1902] A. C. at p. 139, 71 L. J. K. B. 411). So the majority of the Lords held, Lord Robertson (who agreed in the decision on other grounds) doubting.

The Court of Appeal had held otherwise. The result is broadly that a company may to a certain extent warrant the diligence of its secretary in these transactions, but does not warrant his honesty. *McKay's* case, [1896] 2 Ch. 757, L. J. Ch., may be distinguishable on the ground that fraud was not alleged there, but seems difficult to support. It was already not too easy to reconcile with *Bishop* v. *Balkis Consolidated Co.*

Divers learned persons are understood to have thought that, beyond the point thus decided, the case is valuable and important as throwing some new light on the doctrine of estoppel by representation. We confess that we have searched for that light in vain. We have found a warning by Lord Macnaghten against attempting to reduce the principle to detailed rules. The warning may be useful and necessary, but cannot be said to add much to our positive knowledge of the law.

Judicial legislation on the conflict of laws goes on apace. The Reports of the last three months are rich in cases which either confirm established rules or lay down new rules of so-called private international law. We proceed to note half a dozen of such cases.

An action for tort cannot be maintained in England for any act done out of England which is justifiable by the law of the country where it is done. And the declaration of the local law by the local sovereign authority is for this purpose sufficient evidence of that law. *Carr* v. *Fracis Times & Co.* [1902] A. C. 176, 71 L. J. K. B. 361.

This principle has been often laid down by text-writers, and is supported by *Phillips* v. *Eyre* (1870) L. R. 6 Q. B. 1, but it has now for the first time been made an undoubted part of the law of England by the decision of the House of Lords.

The language of their Lordships in this case goes also a good way to support the principle that an action for tort cannot be maintained in England for any act done abroad which would not have been wrongful if it had been done in England.

The marriage of a widow with her deceased husband's brother, if it is valid under the law of the country where both parties are domiciled, and to which both parties belong by nationality, is valid in England.

This is the point determined by *In re Bozzelli's Settlement* [1902] 1 Ch. 751, 71 L. J. Ch. 505.

The decision appears to be in conformity with the principle now generally accepted in England, that capacity to marry depends on the law of the domicil of the parties, but it does not agree with the doctrine laid down by Lord St. Leonards in *Brook* v. *Brook*, 9 H. L. C. 193, 233.

It seems to follow from *In re Bozzelli's Settlement* (among other possible conclusions) that an Englishman can almost certainly contract a marriage, which will be held valid in England, with his deceased wife's sister provided only he (and she?) have become domiciled (not merely resident) in a country, e. g. Jersey, where such a marriage is valid; and also that a marriage between an uncle and a niece where both the parties are domiciled in a country, e. g. Germany, or France, where such a marriage is valid (or may be valid by dispensation), will be valid in England.

English Courts will not recognize a status—in the particular instance the status of a prodigal—unknown to English law. *In re Selot's Trust* [1902] 1 Ch. 488, 71 L. J. Ch. 192, following *Worms* v. *De Valdor*, 49 L. J. Ch. 261.

In re Fergusson's Will [1902] 1 Ch. 483, 71 L. J. Ch. 360, raises an interesting question: When *T*, an English testator, bequeaths money to a legatee who is a German subject domiciled in Hamburg, and directs that in the event (which actually happens) of the death of the legatee in the testator's lifetime, the legacy shall not lapse but shall be divided among the 'next-of-kin' of the legatee, are the 'next-of-kin' to be ascertained according to the law of England, or according to the law of Hamburg?

The practical importance of the inquiry to the parties concerned arises from the fact that the legatee died without issue, leaving a sister of the half-blood and nephews and nieces of a deceased brother of the whole blood, and that whilst under English law the sister of the half-blood is the next-of-kin, under the law of Hamburg the children of the brother of the whole blood, i. e. the nephews and nieces, were (as apparently under the German Civil Code they are) the next-of-kin.

The theoretical interest of the case depends upon the difficulty of determining whether the term 'next-of-kin' is to be construed in accordance with the law of the testator's domicil, England, or in accordance with the law of the legatee's domicil, Germany.

The answer given by Byrne J. is that under the circumstances the term 'next-of-kin' must be construed to mean the nearest in blood according to English law, subject to any question of status

should it arise, and hence that the sister of the half-blood is entitled to the legacy to the exclusion of the nephews and nieces.

The practical conclusion reached by Byrne J. may well be right, but the grounds on which it is based are open to criticism.

The matter to be decided is clearly a question of the interpretation or construction of a will, and as to this there would appear to be several views, each of which admits of logical defence.

First. The term 'next-of-kin,' when occurring in a will executed in England by an Englishman domiciled in England, must prima facie be construed as meaning the nearest in blood according to the law of England, and the will must then be read as though the testator had said in so many words that the bequest should go to the legatee's next-of-kin under the Statute of Distributions. This view is perhaps not easily reconcileable with *In re Andros*, 24 Ch. D. 637, and *In re Grey's Trusts* [1892] 3 Ch. 88. But, if it is to prevail, the reference to the possible question of status, as a matter of German law, seems irrelevant.

Secondly. The term 'next-of-kin,' it may be argued, means, under the circumstances, the person who is next-of-kin, or nearest in blood, to the legatee according to German law; but then, if this be so, as one might be inclined to infer from *In re Andros*, all reference to English law is irrelevant.

Thirdly. It may be held that, purely as matter of construction, an English testator means by 'next-of-kin'—a specially English term—the sort of next-of-kin he is accustomed to, viz. according to the English Statute; and, by 'children' of a person he knows to be domiciled abroad, the persons recognized as children by the law of that domicil (adopted children for example). This view, which may have been in the learned judge's mind, is consistent with the result arrived at in *Andros'* case, but not with Kay J.'s reasons. We throw it out as possible, without recommending it. We hope that either in the present or in some other case these difficulties may be cleared up by the Court of Appeal.

On the death of a bastard intestate, who though domiciled in a foreign country leaves moveables in England, such moveables are in the strictest sense *bona vacantia* and escheat to the Crown not as successor to the deceased but in virtue of the Crown's title to all goods to which no one has a right of succession.

This rule is for the first time laid down by Kekewich J., *In re Barnett's Trusts* [1902] 1 Ch. 847. We are not at all prepared to assert that the rule is not in conformity with English law; what we do assert with some confidence is that it necessarily decides

a question which has never before come directly before an English tribunal, and which has perplexed jurists of eminence. We also venture to regret that where the rule of law to be followed was at least open to doubt, the broad principle was not adhered to that the distribution of the moveables of a deceased person is governed by the law of the deceased's domicil at the time of his death.

Here again it is allowable to hope that a case which raises a point of considerable difficulty may be carried before the Court of Appeal.

'Residence not domicil is the test of jurisdiction in a nullity case,' *Roberts* v. *Brennan* [1902] P. 143, 144, 71 L. J. P. 74, per Jeune, P.

We find here laid down a rule which may probably be convenient, but which, as interpreted by Sir Francis Jeune, leads to the result that the residence of the petitioner—in this case the wife—is sufficient to give the Court jurisdiction to pronounce a marriage null and void even though the respondent is neither domiciled nor resident in England. Note further that this rule, if it be adhered to, disposes of the idea, for which there is certainly some authority (*Linke* v. *Van Aerde*, 10 Times L. R. 426) that the jurisdiction of an English Court in a suit for a declaration of nullity depends on the marriage having been celebrated in England.

The case of *R.* v. *Tristram* [1902] 1 K. B. 816, 71 L. J. K. B. 418, C. A., seems to involve some constitutional questions, at least if any ecclesiastical question can still be called constitutional. It looks like a decision that a bishop, though compellable to appoint a chancellor, may nevertheless reserve power to hear all causes himself; and further, that this always was the law, even when the bishop's jurisdiction extended to matrimonial and testamentary matters.

It was admitted in so many words that a bishop is compellable to appoint a chancellor. But the Court did not enter into any discussion of the question how much that involved, though it seems somewhat material. If the obligation to appoint a chancellor is an obligation imposed for the benefit of the public, it seems to involve an obligation to delegate certain powers. It could hardly be a sufficient fulfilment of such an obligation if the bishop were to say: 'I appoint you my chancellor because it is my duty to the suitors to appoint one, but I intend nevertheless to perform all the duties myself, including the jurisdiction in matters of marriage, divorce, and probate of wills, and therefore I give you no powers at all except the power to call yourself my chancellor.' On the assump-

tion that the bishop must give his chancellor certain powers, of course the next question is how wide these obligatory powers must be, and who is to ascertain what they ought to contain. The ascertainment must necessarily rest with the authority which has the power of compelling the bishop to appoint a chancellor; and this authority is said to be the Archbishop. If the rights of the public who are to be benefited are the same in each diocese, and the compelling authority is the same, one would certainly expect that the obligation to delegate involved the same amount of delegation in each diocese.

But it does not follow that the chancellors' patents would be the same in each diocese. One bishop might desire to delegate nothing more than was absolutely necessary in order to fulfil the obligation; while another might prefer to delegate much wider powers. The forms of the patents given in the appendix to the Report of the Ecclesiastical Courts Commission of 1883 differ in different dioceses; there are several cases where in one and the same diocese the form of patent has differed at different times; in some cases there is internal evidence against the antiquity of the form, as for instance where a table of fees of 1597 is mentioned in a patent. In some cases where the bishop purports to reserve a power for the bishop to supersede the chancellor, there is a proviso that this reservation is not to include the fees; which seems to indicate that the reservation itself was an innovation introduced subsequently to the time when a certain amount of regularity had been established in these appointments.

The Court of Appeal seemed to attach weight to the circumstance that the forms given in 1883 have not varied since 1640. In the first place, that is not quite the fact, though no doubt the variations, so far as given in the blue book, are in comparatively unimportant matters, and do not substantially affect the language of the reservations. In the next place, 1640 seems a somewhat late date for any custom of which the effect is to impair and eviscerate the elder duty of the bishop to appoint a chancellor.

Lord Holt indeed, as well as others, has used language which went even further. He is reported to have said that a bishop may always sit and judge himself. It is dangerous to press dicta of that kind uttered two centuries ago. It does not appear that he was contemplating the case of a chancellor with an irrevocable patent reserving no powers. If Lord Holt's language is to be taken literally, the bishop's power does not depend on the terms of his patent to his chancellor; whatever those terms may be, the bishop may disregard them. If the power of the bishop to supersede the

chancellor is independent of any reservation in the patent, one does not see why the Court of Appeal in *R.* v. *Tristram* attached so much importance to the language of the chancellors' patents.

The language of Dr. Tristram's appointment, after purporting to give the jurisdiction, adds: 'nevertheless first consulting us and our successors and having our consent in case either party earnestly crave our judgment.' Dr. Tristram had disregarded this limitation of his powers, and was therefore held to have acted without jurisdiction. Indeed if his patent follows the form of his predecessor's patent as given in the blue book, all 'causes of instance' are excepted; so that Dr. Tristram could not hear the case even with the bishop's consent, unless the consent be construed as a special independent delegation.

If the case be treated as a decision upon the terms of the patent, it does not seem absolutely necessary to infer that the duty of the bishop to appoint a chancellor may now be put on a par with the duty of canonical obedience on the part of the clergy. Suppose that the bishop has not in fact delegated all the powers, whatever they may be, which ought to be delegated in order to fulfil the obligation to appoint a chancellor. Could the bishop's failure in that respect, if it be a failure, be treated by the Court as a reason for extending Dr. Tristram's powers beyond the language of his patent? That was in effect argued; but it does not seem a self-evident proposition. If that argument be rejected, the actual decision that Dr. Tristram had no jurisdiction seems unexceptionable. But on that footing it would be still open to anybody to contend against the bishop that he had not in fact done all that is involved in the duty of appointing a chancellor.

The judgment of Cozens-Hardy J. in the Clifford's Inn case, *Smith* v. *Kerr* [1900] 2 Ch. 511, 69 L. J. Ch. 755, see L. Q. R. xvii. 7, has been unanimously affirmed by the Court of Appeal, [1902] 1 Ch. 774, 71 L. J. Ch. 369. The appeal was not hopeful, in face of the language of the deed, dated as early as 1618, on which the title of the trustees depended. That language was plainly fitted to create or perpetuate a charitable trust 'for the furtherance of the study and practice' of the law of England, and at the time the Inns of Chancery were still actively carrying out that object. The only difficulty that could be seriously raised against continuing the grant according to its apparent intention was that other Inns of Chancery had been dissolved, and the property held by their trustees or governing bodies treated as private property distributable among the members, without opposition. But, as the M. R. observed, the Court had no knowledge of the particular facts of

those cases, and even if charitable endowments have been wrongfully appropriated in some cases that is no reason why the Court should not administer the law in another case.

The subscriber of a company's memorandum of association identifies himself in so peculiar a way with the company that he must not be surprised at finding himself in a position different to that of the ordinary shareholder. To begin with he acquires the status of a full member at once without any *locus paenitentiae* like the ordinary shareholder's between application and registration. When the cash payment section was in force the subscriber had not unfrequently to pay twice over for his shares, because the shares were 'issued' within the meaning of s. 25 of the Companies Act, 1867, when the company was registered, and it was then too late to file a protecting contract. Now it appears from *In re Metal Constituents, Limited* ([1902] 1 Ch. 707, 71 L. J. Ch. 323) that the subscriber is subject to this further disability, that he cannot rescind his contract though it was induced by the fraud or misrepresentation of the promoters; for the promoters, though accountable to the company, are not for this purpose, at least, the agents of the company, and the company itself cannot be charged, for it was not in existence when the subscriber signed. 'Quibbles! lawyers' quibbles!' exclaims the layman, and it certainly does seem unconscionable for the company to keep a contract procured by fraud; but then if you let off the subscriber of the memorandum—this was how it struck Buckley J.—you are undermining the constitution of the company of which the seven subscribers are the foundation-stones. Change the metaphor however—call the subscribers scaffolding, which they more truly are, because the certificate of incorporation is the real foundation-stone of the company—and the matter assumes another complexion. It is true that subsequent shareholders may have taken their shares on the faith of the subscribers being members, but they must be assumed to know that they have taken them subject to the possible rectification of the register.

Read v. *Friendly Society of Operative Stonemasons of England, Wales, and Ireland* [1902] 2 K. B. 88 is a case of considerable importance on the rule in *Lumley* v. *Gye* (now rescued by *Quinn* v. *Leathem* from the doubts thrown on it in *Allen* v. *Flood*), to which we may return. The short point is that, whatever may be a justification or excuse for procuring a breach of contract, absence of improper motives alone is not.

Story well describes the *donatio mortis causâ* as 'amphibious'—half gift, half legacy. Roman law tended to treat it more as a legacy; English law tends to treat it as a gift. This characteristic is illustrated in a recent case before Buckley J. (*In re Beaumont* [1902] 1 Ch. 889, 71 L. J. Ch. 478). There the subject-matter of the alleged *donatio mortis causâ* was the donor's own cheque for £300 which he caused to be handed to the donee, and which was duly presented; only it so happened that the donor's account was overdrawn, and before the cheque was cashed the donor died. Since *Hopkinson* v. *Foster* (L. R. 19 Eq. 74) it is no longer possible to treat a cheque as an equitable assignment *pro tanto* of the donor's balance. It amounts merely to a mandate to the banker to pay, and if there is no balance standing to the donor's credit there can be no legal obligation on the banker's part to honour the cheque. There was however this *scintilla juris* in favour of the donee, that the bankers were prepared to cash the cheque subject to the signature being verified, but this intention was in Buckley J.'s view insufficient, for there was nothing to bind him—the promise being voluntary—to pay. He might, so the learned judge thought, have changed his mind, when the cheque came back with the signature verified, and said 'I will not lend.' But is this quite so? Would not an intention to honour, communicated to the donee, be equivalent to acceptance in the case of a bill of exchange so as to bind the bankers? Stuart V.-C.'s decision in *Bromley* v. *Brunton* (L. R. 6 Eq. 275) comes to this, though it is expressed in questionable terms.

Farwell J. has in *F.* v. *F.* ([1902] 1 Ch. 688, 71 L. J. Ch. 415) coined a new and useful maxim—*religio sequitur patrem*. In life the father cannot abdicate his paternal duty as to his child's religious faith, and after death his testamentary wishes still prevail. The practical corollary which Farwell J. drew from this was that if a testamentary guardian appointed by the father changes his—or her—religious faith the Court has power to remove such guardian and appoint another, and this the learned judge did. The ward in *F.* v. *F.* was a girl of sixteen, and the guardian a paternal aunt, who from being a Protestant—the father's religion—had become a Roman Catholic. No doubt the religion of a guardian is a very important element in his or her fitness, but it is not everything, and it is quite possible that in an aunt other considerations—the bond of blood and years of affectionate intimacy—might well outweigh the difference of religious opinion. No conscientious guardian so placed would seek to proselytize. The case was compromised

on appeal on the terms of the Court appointing a Protestant guardian to act with the aunt, and this was probably the best way out of the difficulty.

We have received as usual the Calendar of the Law School of Dalhousie University, Halifax, N.S., and again note with pleasure that our brethren of Nova Scotia have a properly thought out and graduated course of legal instruction, including the requirement of arguing in at least two moots before obtaining a degree. Being weary of protesting in the wilderness against the perverse inefficiency of our own Council of Legal Education, we leave comparisons to the learned reader.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

COUNTY COURT JUDGES AND THEIR JURISDICTION.

A COUNTY Court Judge should be the best balanced person in the world, for he rests evenly between two extremes. On the one hand, he is to the Junior Bar and such legal small deer as solicitors an object of idolatrous adulation; on the other, he is patronized by the High Court Bench, and pooh-poohed by 'silks' whose practice, in the main, consists in writing letters to the Chancellor, pointing out their undeniable claims to be reckoned in the number of those they affect to pity! And so, the eternal law of compensation obtains; and an excess of admiration is counterbalanced by an excess of detraction.

And first, as an introduction to my subject, let me say a few words about the personality of the County Court Bench, which has fifty-four members to do its appropriate work in England and Wales. Numerically, therefore, the Bench is not strong, but there is not the least doubt but that it is surprisingly well officered.

I say 'surprisingly,' because Lord Halsbury, who has perhaps at times dealt heavily with the High Court, has tempered the wind to the about-to-be-shorn lamb who litigates in the County Court. There are certainly some judges who are reminiscent of the days when the County Court was merely a court for the recovery of small debts, and not one possessing an important and varied jurisdiction, but even these are not so conspicuously unsuited as many who occupy higher places; and in most instances their amiability entitles them to the affectionate respect of all but the 'lady litigant in person.' In short, though here and there are to be found specimens of the Chancellor's frolicsome fancy, they are very few, and repose in unimportant districts where the work is light and rare. On the whole, the County Court system is worked by sound and experienced lawyers, and the litigant may view with as near an approach to complacency as legal proceedings will allow an incursion into the County Court.

Now, having discussed the judges, it may be interesting to know what they do.

Well, generally speaking, each has to administer the law within his own district, and his work takes up about three weeks out of every month.

Some judges do more and some less, but the average is as I have stated.

The jurisdiction is both wide and varied, and in the main is only limited as to amount.

On the Common Law side the judge has original jurisdiction in all personal actions—except those of Breach of Promise of Marriage, Seduction, and Libel and Slander, and questions as to Tolls et hoc genus omne—up to £50. This limit can be, and very often is, by order of the High Court extended to £100 in Contract; and in cases of Tort (i. e. wrongs independent of Contract, which include Breach of Promise), if a plaintiff is poor and cannot give security for costs, his action may be remitted to the County Court. I shall deal with this provision later.

In Equity, the judge has jurisdiction up to £500; in Probate, in contentious matters where the personal estate does not exceed £200 and the real estate £300; in 'Companies Winding up,' in the case of companies in which the paid-up, or credited as paid up, capital does not exceed £10,000; in Admiralty, up to various small limits, and provided he has been given Admiralty powers, which is not always the case; in Bankruptcy, he has absolutely unrestricted jurisdiction. Furthermore he has to deal with judgment debtors under the Act of 1869, and is the judge who alone has original jurisdiction in Employers' Liability cases, and in applying that series of legal conundrums, the Workmen's Compensation Act of 1897. He also has jurisdiction in certain criminal and lunacy matters.

Therefore it will be seen that, taking away Divorce and Ecclesiastical—and to a great extent Criminal—Law the County Court Judge has to be an expert in every branch of law; or, in other words, he has to do the work of a (1) Chancery, (2) Common Law, (3) Probate, (4) Admiralty, (5) Bankruptcy Judge, and, because his work is judged by the fallacious test of amount in dispute, he has about a third of the salary of a High Court Judge, who specializes in one department, and only occasionally wanders into another.

I have said 'fallacious test,' and it is a correct expression. The magnitude of a case is not to be weighed by its money value; identical questions of law may arise in a claim for one farthing and one for a million pounds, and it is notorious that the difficulty of a case in law cannot be even approximately gleaned from a statement of the sum claimed.

But because of that fallacy, which originated in the days when the County Court was merely a small debt recovery court, the County Court Judge is not properly remunerated.

Contrast his position with that of the High Court Judge. He

has to travel almost perpetually, and over long distances, except in a very few instances. He seldom has the assistance of a jury, hardly ever of a library. There being no pleadings—the notices of defence required in certain cases not being worthy of the name—in the County Court, the points are sprung upon him, and he has to decide them off-hand, for it would be impossible for him to 'reserve' judgment in any but a few cases and do his work on his circuit. As a judge of fact he is absolute; and cannot, without his consent, be appealed from as to questions of law, except in cases where the amount claimed exceeds £20, and thus is under a very heavy responsibility. He only now and again has the assistance of counsel. In fact, more often than not unaided, he must on the spur of the moment determine the law, ascertain the facts, and give judgment in thousands of cases during the year.

My critic will perhaps contend that the cases that come before a County Court Judge are mainly simple, but any experienced practitioner would say that the proportion of simple to difficult cases in a County Court is much the same as that in the High Court. Again, many of our greatest reported cases originated in the County Court, and a glance at the above list of subjects of original and secondary jurisdiction should of itself be sufficient proof of the baselessness of the contention.

And with respect to this point, it should be ever borne in mind that no matter what the nature of the wrong may be, provided it is not contractual, if the plaintiff is poor he may be sent down to the County Court for trial, so great is the essential difference between the two kinds of judges!

And for all this work the County Court Judge is paid £1,500 a year, plus a hundred or two which he can save out of expenses, and if he falls ill, he has out of that meagre salary to pay his deputy. The High Court Judge, on the other hand, who does not work nearly so long—he makes holiday over *five* months in the year, and if he is a King's Bench Judge goes circuit another three—has only cases of a class and one class only before him, and gets £5,000 per annum for his services. Not only that, but when he goes circuit, e.g. to Haverfordwest, where he is given three days to try one prisoner, he is allowed an additional £7 10*s.* per diem, and is provided with a kind of make-yourself-generally-useful secretary styled 'marshal,' in addition to a clerk whom the country pays £400 a year—for doing nothing. Further, if he is absent from work by reason of illness or a desire to be elsewhere, no deputy is required. The vacant place awaits his return.

Now, without saying one word against the High Court Judges, whom I regard with an admiration which is almost pathetic in its

childlike docility, I maintain, not that they are paid too much, but that judged by the standard of their salaries, the County Court Judges are paid too little. In short, I advocate levelling up and not cutting down.

Really it almost compels anger, when one reflects that while the County Court Judges are so poorly paid, individuals who ape pantaloons and carry wands and other rubbish are kept by the taxpayer in luxurious ease.

What can be done? I again say: level up; allow something extra for the 'dignity' of the High Court, and fix the County Court salaries in proper proportion.

Would any reasonable person say that allotting £2,500 a year to dignity, a similar sum would be too much to pay the inferior judge? I think not; but the old argument might be advanced, namely, that if a good inferior judge can be obtained for so much, why give him more?

Such an argument is worthy of an East End manufacturer, who gives starvation wages for work. It is not worthy of a great nation, which boasts of its legal system, and spends millions on flunkeys and fripperies.

And test this argument by applying it to the superior judges! Are there none of them who would not accept much less than they get?

Was not one of them for years an admirable official referee at a salary of £1,500?

Was not—but, in view of what I have still to write, this topic has been sufficiently discussed. Enough has been said to show that a most necessary and responsible high judicial officer is not treated fairly. In other words, he is sweated, his remuneration being fixed on the basis of supply and demand.

So let me turn to some other considerations which involve criticism, and point out a few illustrative examples of necessary reforms. I have already stated that the County Court Judge has too much to do in respect of his original jurisdiction, and that he is overburdened by being forced to try what are termed 'remitted actions.'

These actions are either contract cases where the claim does not exceed £100, or tort to any amount.

The first class is comparatively unimportant, but the second needs discussion.

In any action of tort a poor man who sues in the High Court can be compelled to give security for costs or be remitted for trial to the County Court.

I have before dealt with this rule from another aspect, but

not as it affects the business of the County Court, where it is especially disastrous. For it sends into the County Court cases which the judge has neither the time nor the conveniences to properly try.

Let me give an example. Some time ago an important trade libel action was sent to be tried at Brentford County Court. It took two entire days, and resulted in £175 damages for plaintiff. And even now, at the date of writing this, a seduction action is awaiting trial at Bloomsbury County Court.

These two classes of action are extremely difficult, and it is grossly unfair to the County Court Judge to compel him to do his superior's duty. But compelled he is, and the result is that while the High Court Judge meanders aimlessly through a series of maiden assizes, his County Court brother spends his small amount of spare time in deputizing for him!

Another rule that stands in need of alteration is the one that allows any party to an action in which the claim exceeds £5 to demand a trial by jury.

Now this ought not to be so, and no jury should be allowed save by order of the judge himself. The County Court Judge has not the time to give to a jury, and besides, should not a High Court Judge be entrusted with the delicate task of pointing out the path of propriety to the subordinate triers? If not, I ask again, where does the essential distinction come in?

Let any of my readers who wish to study another phase of this question watch a jury case in progress at Westminster County Court. The barristers, witnesses, judge, and jury are cheek by jowl in a six-foot area, where it is impossible for counsel to deal effectively with a jury.

If the object of a jury is to safeguard a litigant from the fear or favour of a judge, it is surely unnecessary in the case of a County Court Judge. If it be that it shall temper justice with mercy, or give relief to a litigant in a 'general' verdict, how can a learned counsel achieve the desired end, when if he moves his left hand he strikes a juryman in the face, and if he moves his right, he overthrows the witness-box and threatens the balance of the judge's desk.

At Wandsworth County Court the jury-box is separated from the counsel's table by a huge erection, in which witnesses stand. If the counsel is a small man, he can only see the jury between the chinks; if he is tall, an attempt to look at the jury he is addressing must inevitably end in squinting.

At the Greenwich Court things are even worse, for an awkward move—and counsel is 'among them.' At Clerkenwell—but a visit

to the County Courts of the metropolis will inevitably lead to the conclusion that they were never made for juries.

To a reader who is not a practising barrister these facts may not convey much, but nevertheless in reality they are most instructive.

In the country, where County Court buildings range from ball rooms to tin sheds, merely physical reasons have not the same force as in London, but still they are in the main illustrative of the unsuitability of County Courts for trial by jury.

But, it may be asked, if juries go what will become of Employers' Liability cases? Well, they should go too. In my opinion, this most important of all classes of action should be tried in the High Court by a special jury, which cannot be obtained in a County Court, and costs should be regulated so as to make it possible. If there be exceptional merit in a High Court Judge, this class of case needs its application.

Another matter of reform appertains to Appeals.

Nowadays, roughly speaking, and ignoring two or three exceptional instances, an appeal only lies from a County Court in respect of claims which exceed £20, or, with the consent of the judge, of any amount.

And even then they only lie in respect of an error in law or equity, or a mistake in admitting or rejecting evidence.

Now this provision is very unfair to poor people, and I strongly advocate that without the consent of the judge no appeal whatever should be allowed.

If this were done wealthy litigants would be deprived of the undue advantage they now possess, and stand on the same footing as their poor opponents.

As all lawyers know, it is very easy to make a case turn on a legal point; and that being so, *A*, the labourer, has but a poor chance with *B*, the Insurance Company, when they enter upon a fight of endurance. True *A* can sue *in formâ pauperis* if he obtains counsel's certificate of fitness, but, granted that, what chance has a pauper of securing that exceptional care and skill which are necessary to protect him from the enemy? Practically none; but if the right of appeal were abolished, the poor man would have no difficulty, in a proper case, in obtaining the services of a respectable and able solicitor, who would pay competent counsel and stand the chance of getting his money back.

This would, it might be said, encourage the speculative solicitor. Well, if it did, so much the better; for, as the great Lord Russell of Killowen said from his place on the Bench, the solicitor who 'speculates' for the purpose of getting justice for the poor is a boon to the community.

The next point I have to deal with is one of vast importance to every man and woman in this country.

The Debtor's Act of 1869 is an Act which is intituled, 'An Act for the Abolition of Imprisonment for Debt, for the punishment of Fraudulent Debtors, and for other purposes,' and by it, imprisonment for debt is popularly supposed to have been abolished.

Whether that is so remains to be seen.

Section 4 of the Act says:—

'With the exceptions hereinafter mentioned, no person shall after the commencement of this Act be arrested or imprisoned for making default in payment of a sum of money.'

The exceptions 1, 2, 3, 4, 6 refer to penalties, sums recoverable summarily, default by a trustee or an attorney or solicitor, bankrupt's salary, sums payable under the Act.

But section 5 saves the power of committing for non-payment of a judgment debt or any instalment of it, subject to each period of imprisonment not exceeding six weeks, and the jurisdiction being exercised by a judge of the High Court of Justice, a judge of County Courts, a registrar of the Court of Bankruptcy—in the case of the last two, in open court.

And provided (sub-section 2)

'that such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default and has refused or neglected or refuses or neglects to pay the same. . . . Proof of the means of the person making default may be given in such manner as the Court thinks just.'

And by such regulations is the old and indefensible system of taking a man's body if goods are not available, legalized.

I have said 'indefensible,' and this the legislature has recognized. The Act abundantly shows it, but under another name, 'Contempt of Court,' it has given the judge the same power, somewhat limited it is true, which has been pronounced against by the general sense of civilization.

But, says the apologist, who is generally a tradesman, 'Imprisonment for debt is necessary. If that were not so, there would be no trade credit given to the poor.' That, to my mind, is a baseless assumption, for as much credit is given in districts where the County Court Judge—and it is he who in the huge majority of cases administers these penal clauses—will not commit debtors to prison, as it is 'where come one come all,' prison inevitably follows in the wake of non-payment.

Again: Can the veriest debt-collecting solicitor pretend that when a tradesman is asked for credit he relies on, as his security, eventual imprisonment, and not his customers' position and reputation for honesty?

Is it not rather the truth that what makes poor people—and mark that it is on account of the poor that this cruel reservation is justified—scrupulous in paying their bills is the knowledge that they will get no more credit if they do not?

Assuredly it is, and to seek to further prove this fact, for such it is, would be mere waste paper.

Is it not again lamentably disingenuous of people, who know that 'contempt of court' was only intended by the Act, to ask for imprisonment on any other ground of a debtor?

But it may be advanced that a judge must not send a debtor to prison unless he is satisfied that either he has or has had means, and is therefore guilty of contempt in not obeying the order of the Court; but that line of argument is not good since it is based on a provision which can be practically disregarded, as indeed it too often is. If a judge disbelieves in imprisoning people because they have not paid their debts, he will not do it, but if he—as too many judges do—believes in treating debt as a criminal offence, the Act is in the main a nullity.

A recently retired and otherwise just judge was satisfied with the merest tittle of evidence as to means, and no amount of appealing could alter it[1].

The word of an office-boy that Mr. So-and-so dressed well was quite enough for him, and it was useless to try to prohibit him, for 'prohibition' only applies to error in law and not to the exercise of discretion. The writer twice appeared to support the orders of this judge, and in each case successfully, though in each case the High Court stated they could not understand how the judge came to be satisfied on such evidence: they confessed that they were helpless, and so they are in the case of many other judges.

I could multiply instances of the way in which these clauses have been administered, but I will give only two.

In one a judge held that the means of the wife were the means of the husband; and in another, the fact that a man, when going to town of a morning, once or twice took out gold and silver from his pocket when paying for his ticket was held enough to justify his being committed.

Then as to the 'six weeks' limit': that is all rubbish. The debt-collecting solicitor who is up to this, generally his only work, asks

[1] [A late Vice-Chancellor, we have been credibly informed, held living in a square to be conclusive evidence of solvency.—Ed.]

for payment by small instalments, and as each falls due, and is not paid, a judgment summons is taken out, and the debtor can be, and occasionally is, sent to prison for six weeks in respect of each instalment.

And speaking from my own experience, I have known a pauper bed-stricken woman to be taken from her sick room, and if the bailiff had not humanely taken her to the creditor's solicitor's office, she would have been sent to Holloway Prison, there to purge her contempt in not paying what she did not possess.

I have heard a judge sentence a poor washerwoman, who according to her own account, which was not contradicted, had to support a sick husband and four infants on eleven shillings a week, to be imprisoned for one month for not paying a grocer's bill. But enough; in a considerable experience of criminal courts, I have seen nothing more piteous than the spectacle, too often afforded in County Courts, of the widow and pauper being sent to gaol because they were poor!

In the recently published returns in 1889, out of a large number of persons committed very few went to gaol. And what does that show? Merely that those who could pay did pay, and that those who could not pay went to prison.

But, it may be said, if it had not been for imprisonment, the others would not have paid. That at the most is but an assumption, but even if it be correct, does that justify the country in sending poor people to prison, to act as it were *in terrorem* to present and would-be debtors?

Can the breaking of a contract to pay for goods reasonably warrant the shutting up and compelling to the hard labour of a felon—for that is what it is now—of the man who has failed to do what he thought he could do, who has in law committed no offence against the State, and who has himself paid his creditor for taking the risk of non-payment?

It were well to ponder the question, and also take into account, that in increased prices, the country also pays the tradesman an insurance against failure on the part of his customers to perform their contract.

And further, take into consideration that while the man who has contemned a court by libelling it, or doing what he has been ordered not to do, can furnish his own rooms in prison and live in a luxurious way, the poor debtor, for *his* contempt of court, must do hard labour, and live on the starvation diet of a short-time offender.

And finally, while admitting that only a minority of High Court and County Court Judges do infringe the liberty of the subject, by

utilizing these clauses, is it not the clear duty of the legislature to erase from the statute book an anomaly which enables a judge, if he so pleases, to punish a subject for being poor?

And now I must put an end to this article. There are many other points and matters I should like to discuss, but I have not the space.

I have placed on record what I conceive to be the views of all, except a 'sweating' treasury—of the County Court Bench, and if I have not praised sufficiently, it is not from lack of appreciation. The County Court Bench, at present, is well officered and inadequately remunerated.

In the near future let us hope that its labours will be more generously and properly estimated, and at all events, that with any increase of jurisdiction will come an appreciable increase in the official estimate of its work and importance.

ERNEST BOWEN-ROWLANDS.

COUNCIL AND STAR CHAMBER.

IN considering the relations between the Privy Council and what is generally known as the Court of Star Chamber it is useful to bear in mind the previous history of the Council. Sir Henry Nicholas has pointed out that the king's continual council at one time exercised a more extraordinary combination of legislative and executive functions than any other political assembly has perhaps claimed for itself. In addition to its supreme and exclusive title to the office of chief advisers to the Crown, and chief instruments of the royal will as displayed in acts of government, it arrogated to itself for a long period an almost illimitable right of judicial interference. Before the jurisdiction of the courts of law and equity were marked out there was scarcely a department of state which was not in a greater or less degree subject to its immediate control. No rank was too exalted or too humble to be exempt from its vigilance, nor any matter too insignificant for its interference [1].

As a matter of history we know that Parliament, from which at one period we can hardly distinguish Council, took over the work of legislation, that on the judicial side, the Council, while throwing off the courts of common law, remained the depositary of the residuary royal jurisdiction in civil and criminal matters, that on the civil side this jurisdiction became in the main the Chancellor's system of equity, while the criminal jurisdiction remained in the hands of the Council as such. The differentiation of function was, however, a gradual and slow process. For the common law judges, who were at first members of the Council, but who seem to change their relationship to the Council and to become legal assessors rather than members, for a long time sit with the Council [2] for its guidance, and also down to the time of Cardinal Wolsey were formally or informally associated with the Chancellor.

Differentiation spells specialization. The judges had their own proper work to do, while the Council's activities became essentially executive. It was in virtue of its great executive powers that it made its mark on the administration of justice. One might perhaps say that its functions were not so much those of a judge as of

[1] Proceedings and Ordinances of the Privy Council, ii, Introduction.

[2] So on Feb. 10, 1403, there were present 'les justices de lun Banc et de lautre' (Nich. i. 197).

a police magistrate. Coke[1] observes that the Council in ancient times rarely sat judicially except for summons and exorbitant causes and not such as ordinary courts could condignly punish, lest it should draw the king's council from matters of state to hear private causes and the principal judges from their ordinary courts of justice. It is significant that the 'articles of government' of Council in 2 Hen. VI[2] find it necessary to provide for the presence of judges *where the Council is not learned enough*, and that similar provision is made in the articles of 5 Hen. VI and 8 Hen. VI.

This perhaps marks a change, for Coke says that 'in 28 Ed. III it appeareth that the returns "coram nobis" are in three manners; "coram nobis in Camera" (which it was said was afterwards called Camera Stellata), "coram nobis ubicunque fuerimus in Anglia," which is the King's Bench, and "coram nobis in Cancellaria."'

In the precedents which Coke preserves from Ed. III onwards the style of the court is 'coram rege et consilio,' sometimes the words 'in the Star Chamber' being added.

This famous room was built conveniently 'near the Receipt,' i. e. the Treasury. It was begun in 1347 and finished the next year, and immediately became the Council room. The name 'Sterred Chamber' is first found in or about 1348 in the tilers' accounts of 21 & 22 Ed. III[3].

Down to the Tudor times, it may be said with confidence that the words 'in the Star Chamber' are a mere geographical expression; they are not and never were part of the 'style' of the court. The minutes of the Council show that when they were at Westminster they usually sat there. So in the Issues of the Exchequer of 12 Ric. II there is an entry of seven shillings paid to Henry Winchester for a Kalendar purchased from him for the king's use, viz. to be kept for the use of the Lords of the Council in the Star Chamber, and again in 1 Hen. IV there is another payment for rich cloths and cushions provided for the advantage and accommodation of the Lords and nobility appointed to consult together on behalf of our Lord the King in the Star Chamber.

Down to the Tudor period the composition of the Council is free from doubt. If we pass *per saltum* from this period to that of Coke and Bacon, again there is no uncertainty, for both Coke and Bacon knew the tribunal well, and they agree. And this and no other is the court that is known commonly and conveniently as the Court of Star Chamber, though, as Coke says, the style of the court is 'coram rege et consilio.'

[1] Inst. iv. c. 5.
[2] Rot. Parl. iv. 201.
[3] Queen's Remembrancer's Ancient Miscellanea $\frac{1}{1}\frac{1}{1}$.

'The Judges of the court are the Grandees of the Realm, the Lord Chancellor, the Lord Treasurer, the Lord President of the King's Council, and the Lord Privy Seal, all the Lords Spiritual and Temporal and others of the King's most honourable Privy Council, and the principal judges of the realm and such other Lords of Parliament as the King shall name . . . And the court cannot sit for the hearing of causes under the number of eight at least. This court . . . doth keep all England quiet.'

'It is, or may be, compounded of three several Councils:

'(1) Of the Lords and others of His Majesty's Privy Council, who are *always judges without appointment.*

'(2) The Judges of either Bench and Barons of the Exchequer are of the King's Council for matters of law; and the two Chief Justices, or in their absence two other Justices, are *standing judges of this Court.*

'(3) The Lords of Parliament are properly *De magno consilio regis*, but neither these being not of the King's Privy Council nor any of the rest of the Judges or Barons of the Exchequer are standing judges of this Court[1].'

So Bacon says, 'The Court of Star Chamber is compounded of good elements, for it consisteth of four kinds of persons, counsellors, peers, prelates, and chief judges[2].'

This court of Coke and Bacon is in reality and style the same court which existed before the reign of Henry VII.

We are fortunately able to give some account of the proceedings of the Council in 1596, the thirty-eighth year of Elizabeth, and show the relationship between council and court. Mr. Dasent has brought the Acts of the Privy Council down to this date, and we can compare them with Les Reportes in Camera Stellata, 1593–1609, edited by Mr. Baildon.

The writer of the book was John Hawarde, of the Inner Temple, Bencher 1613, Reader 1625, who apparently sat in court and took notes, which he afterwards wrote up. In 1600 he enjoyed the distinction of himself being sent for by the Privy Council to explain some conduct in connexion with a letter of Lady Rich to the Queen, but emerged, he says, with 'credite and commendacyon[3].'

In 1596 the following persons formed the Privy Council: Whitgift (Archbishop of Canterbury), Puckering (Lord Keeper; died Ap. 30), Lord Cobham, Sir William Cecil (Lord Treasurer), Sir Robert Cecil, Sir Henry Carey (Lord Chamberlain), Earl of Essex (Master of Horse), Sir John Fortescue (Chancellor of Exchequer), Lord Howard of Effingham (Lord High Admiral), Egerton (Lord Keeper), Lord Buckhurst (Lord High Butler), Sir Francis Knollys

[1] Inst. iv. c. 5.
[2] Life of Henry VII (Spedding), vi. 85.
[3] The MS. is in the collection of Alfred Morrison, Esq., and is mentioned in the 9th Report of the Hist. MSS. Comm., p. xvii, and App. II. p. 406.

(Treasurer of the Household), Sir T. Heneage (Chancellor of the Duchy), and Sir J. Wolley (Latin Secretary; died in February).

In that year, down to and including May 21, Mr. Hawarde gives ten sittings in the Star Chamber. With the exception of the three last-mentioned Councillors all came and sat in the Star Chamber, at some time or other. Some Councillors attended with great regularity. The Lord Keeper Puckering attended every meeting till his death, when his successor Egerton attended all the rest. Lord Buckhurst was very nearly as good, and so was the Archbishop of Canterbury. The Chancellor of the Exchequer only missed one. Sir William Cecil came thrice, the others once or twice.

Amongst those who were most regular in attendance at Council are the Lord Keeper, Lord Buckhurst, the Archbishop, and the two Cecils.

But in the Star Chamber we find others *who are not of the Privy Council*, viz. Anderson C.J. of the Common Pleas, Popham L.C.J., and Peryam C.B. of the Exchequer, Walmesley J., and the Bishop of London.

Of these the two Chief Justices and the Bishop are models of regularity.

An inspection of the dates shows that the two meetings were never allowed to clash, but that if Council business had to be done on a Star Chamber day, the Council came and did it in the Star Chamber either before or after the more strictly legal business.

At the time we are dealing with, the early part of 1596, the Court was at Richmond, and moved to Greenwich somewhere about April 20.

The subjoined diary, compiled from the two records, speaks for itself:—

Jan. 25. Council at Richmond.
„ 28. Star Chamber Court.
„ 30. Council and a Court at Star Chamber.
Feb. 1. Council at Richmond.
„ 2. The same.
„ 3. The same.
„ 4. Star Chamber Court.
„ 6. The same [1].
„ 8. Council at Richmond.
„ 11. Star Chamber Court [2].
„ 13. Star Chamber Court.
„ 15. Council at Richmond.
Ap. 29. Star Chamber Court, and letters signed in Council by some of those who formed the Court.

[1] On this date some formal business was done in Council, but no names of Councillors are given as present, and the same thing happens on the 12th.

[2] On the 11th and 13th some appearances before the Council were entered, but this could be done before a clerk according to Coke.

May 9. Council at Greenwich.
„ 12. Star Chamber Court.
„ 14. Council at Greenwich.
„ 16. The same.
„ 19. Council and Court at Star Chamber.
„ 21. Star Chamber Court.
„ 24. Council in Star Chamber.
„ 25. Star Chamber Court.

The following extracts from the Council minutes leave no doubt as to the allocation of business between council and court. It is the old story over again. The Council does not desire to act in judicial matters without the best professional assistance:—

At Hampton Court, Jan. 21, 1592.

'Whereas there is depending before their Lordships a cause in controversy between Mr. Doctor Caesar, Judge of H.M.'s Court of the Admiralty and Philip Corsini, merchant stranger, wherein they mind to proceed forthwith and so end and determine the same, their pleasure is that the parties with their witnesses and learned counsel on both sides shall attend their Lordships' on Friday next at the Star Chamber in the afternoon, *when some of the Judges shall be present to give their opinions upon such points of the controversy as their Lordships shall find requisite for their better direction in the ending and ordering thereof.*'

At the Court at Croydon, May 14, 1593.

A commission having issued to examine into some disturbances regarding some weirs on the Trent, their Lordships 'finding the examinations of either side much different and the matters meet to be censured and decided by ordinary course of justice,' finally order that 'all questions grown of the said weir shall be referred to *the judicial trial of the Star Chamber and other her Majesty's Courts of Record at Westminster*, . . . and that the same shall be no more dealt in at the Council Board.'

At the Court at Nonesuch, June 5.

An order to magistrates of Notts. to release one Bulby from gaol, that he may attend the prosecution of this case in the Star Chamber as the matter of the weir is 'judicially depending' there.

At Nonesuch, June 19, 1593.

A letter to Lord President and Council of the Marches of Wales. One Wheler had complained of perjury in the Dean of Worcester and others, whereby he had been fined £5, and for trial thereof 'a bill is exhibited into the Star Chamber *before us* where the same is to receive hearing.' Process is to be stayed in the Court of Marches for levying the fine, till the matter is heard and determined.

At Richmond, Dec. 13, 1595.

A letter to the Lord Warden of the Middle Marches near Scotland. Certain people have committed misdemeanours fit to be

answered here; the Lord Warden is required to take bonds for 'their appearance *before us* the first setting day in the Star Chamber next term.'

In the face of such evidence it is impossible to suggest that we have here two rival courts.

In 1612 (10 Jac.) the same relations are exhibited in the curious proceedings against the Countess of Shrewsbury[1] before a 'select council' for a contempt in refusing to answer fully before the Privy Council. The meeting was held at York House before the Lord Chancellor, the Archbishop, the Duke of Lennox, the Lord Privy Seal, the Lord Chamberlain, the Earls of Worcester and Pembroke, Viscounts Erskine and Rochford, Lords Zouch, Knollys, and Wooton, the Chancellors of the Exchequer and the Duchy, the Lord Chief Justice, the Master of the Rolls, Coke C.J. and Tanfield C.B.

The majority of the Council were there, including the most important members, with the chief judges added.

It is stated that this selected Council is to express what punishment the offence justly deserved if *it be judicially proceeded with within the Star Chamber.* This procedure being out of the king's mercy and grace that the lady might submit to the king without any punishment in any court judicially.

It was resolved that *if any punishment should be given in the Star Chamber it should be a fine of £2,000 and imprisonment during pleasure.*

In 1631 (7 Car.) the Privy Council according to the Register, which by the kindness of Mr. Dasent and Mr. Ledlie I have inspected, numbers forty, six or seven being Scotch peers. Of them fifteen are present in the Star Chamber to hear the case of *Falkland* v. *Mountmorris and others*[2]. This, however, was a specially interesting case, the complainant, Lord Falkland, himself a Privy Councillor and Lord Deputy, having been accused of complicity in what looks like a judicial scandal in Ireland. On other occasions the attendance was scanty, sometimes not more than five were present, two of whom were Chief Justices[3].

What then was the object and the effect of passing what is known as the Star Chamber Act of Henry VII[4]?

[1] 2 St. Trials, 769. [2] Star Chamber Cases, 1631–2 (Camden Soc. vol. 39, N.S.).
[3] Ibid. under date Ap. 20, 1632.
[4] 'The King our said Sovereign Lord remembereth how by unlawful maintenance, giving of liveries, signs, and tokens, and retainders by indentures, promises, oaths, writing or otherwise embraceries of his subjects, untrue demeanings of sheriffs in making of panels, and other untrue returns, by taking of money, by juries, by great riots, and unlawful assemblies, the policy and good rule of this realm is almost subdued and for the not punishing of these inconveniences and by occasion of the premises little or nothing may be found by inquiry, whereby the laws of the land in execution may take little effect, to the increase of murders, robberies, perjuries, and unsureties of all men living, and losses of their lands and goods, to the great displeasure of Almighty God. Therefore it is ordained for reformation of the premises by authority of the said Parliament that the Chancellor and Treasurer

From the researches of an American lady [1] in the Harl. MS. 6811, Art. 2, and Add. MS. 4521, Art. 9, and Harg. MS. 216 it seems that in his two first years Henry VII sat at least ten times with his Council in the Star Chamber, on one occasion (Feb. 9) the Council numbering twenty-six, including Hody A.-G., and considered riots and political business.

In the Year Book 2 Ric. III, fos. 2 and 11 we find the cases of the Spanish merchant, and the Waterford merchants, 'coram rege et consilio.' The opinions of *all* the judges were taken *in Camera Scaccarii.* On the other hand, in Y. B. 2 Hen. VII, Mich. T., fol. 9 the justices of the Common Bench desiring advice 'surrexerunt et allerent al Chancelier & Seigniors de Star-Chambre.' It may well be that Henry, who was a frugal man, intended to make a small judicial committee, with professional assistance, seven persons in all (to whom Henry VIII added the Lord President [2]), to take judicial as opposed to high political work, and so leave the rest of the council and the rest of the judges free to attend to their proper business. The offences named in the statute were precisely those that the common law had failed to cope with. It may be only a coincidence, but the new court bears a considerable resemblance to the Court of Exchequer Chamber as established by 31 Ed. III, st. 1, c. 12.

For a short time, it seems, the statute was strictly construed; we may note the decision which Coke disapproved (Y. B. 8 Hen. VII, 13) that only the Chancellor, Treasurer, and Lord Privy Seal were judges by the statute 3 Hen. VII, that it was 'error' if the two councillors and justices were not called in, but they were *assistants et aidants et nemy juges*, yet next year, on June 2, a court was formed of the Chancellor, Treasurer, the two Chief Justices, and the Chief Baron when an injunction was granted against wearing liveries [3].

I am indebted to Mr. Leadam, who is editing a volume of Star Chamber cases for the Selden Society, for a note of a case in 1508 (13 Hen. VII) concerning a conflict of jurisdictions at Shrewsbury,

of England for the time being and Keeper of the King's Privy Seal or two of them, calling to them a bishop and a temporal lord of the king's most honourable council, and the two Chief Justices of the King's Bench and Common Pleas for the time being or two other justices in their absence, upon bill or information put to the said Chancellor for the king or any other, against any person for any misbehaviour before rehearsed, have authority to call before them by writ or by Privy Seal the said misdoers, and them or other by their discretion by whom the truth may be known to examine and such as they find therein defective to punish them after their demerit, after the form and effect of statutes thereof made, in like manner and form as they should and ought to be punished as if they were thereof convict after the due order of the law.' 3 Hen. VII, c. 1.

[1] Miss Cora Scofield, of the University of Chicago, who has written a thesis on the topic, which my friend Mr. Leadam has shown me.

[2] 21 Hen. VIII, c. 20.

[3] Liber Intrationum. Add. MS. 4521 and Harg. MS. 216.

where the court was composed of the Archbishop of Canterbury, Rede C.J., Brudenell, Fisher, Butler, and Kingsmill JJ., all of the Common Pleas, Tremayle J. of the King's Bench, and the Prior of St. John of Jerusalem.

In fact, so far as we know at present, there is no record of a court constituted in precise accordance with the terms of Henry's statute. If it ever lived its life was short, and it died before it was christened. The statute gave its child no name, though in the Parliament Roll there is a heading to the statute of 'Pro Camera Stellata.' In *Chambers'* case (4 Cro. 168) where the defendant, who had been committed to the Fleet prison by the Star Chamber, for words he used at the Council table, being brought up on his *habeas corpus*, prayed deliverance because st. 3 Hen. VII, c. 1, 'which is the foundation of the Court of Star Chamber, doth not give them any authority to punish for words only, all the court informed him that the Court of Star Chamber was not created by that statute, but was a court many years before,' herein agreeing with Coke and Bacon [1].

The permanent effect of the statute seems to have been to make the Chief Justices, as Coke says, standing judges of the court, and incidentally to cause it to observe the Law Terms: 'This Court,' says Coke, 'sitteth twice in the week in the Term time, viz. on Wednesdays and Fridays, except those days fall out to be the first or last days of Term, and then the Court sitteth not, but it constantly holdeth the next day after the Term ended.'

If Coke is correct, and he speaks with authority, the statute gave a power to examine on Interrogatories on oath, which did not exist before 'the want whereof especially in matters of frauds and deceits (being like birds closely hatched in hollow trees) was a mean that truth could not be found out.'

We may, perhaps, also suggest that the statute supplied some foundation for that list of common law misdemeanours, which before unknown or little considered, we owe to 'the curious eye of the King's Council prying into the inconveniences and mischiefs which abound in the commonwealth.'

A. T. CARTER.

[1] See also Hudson's Treatise on the Star Chamber, part ii, § 2.

THE ENGLISH LAW OF DEFAMATION:

WITH ESPECIAL REFERENCE TO THE DISTINCTION BETWEEN LIBEL AND SLANDER[1].

IF an intelligent foreigner, having an intimate acquaintance with the Legal Systems of modern Europe, were asked after *a priori* consideration to pronounce on the authenticity or otherwise of some half dozen or so main propositions in the English law of Defamation, it is safe to say that in the majority of instances his pronouncement would be wrong. If, for example, he were to be asked whether or no he thought it possible that an English lady could in the end of the nineteenth century be assailed by spoken slander imputing the vilest forms of unchastity, without any civil remedy, whatsoever, he would not hesitate in saying 'No.' But yet, until 1891, the imputation of adultery to a married woman, however malicious and industrious the circulation of the lie, was not *per se* actionable. The Slander of Women Act, however, of that year, for us marked a very great advance. For it quickened the atrophy of centuries, and actually, in one small respect, made our law as civilized as that of the Mosaic system of more than three thousand years sooner. Still, we are conservative, and the Act did not go very far. For even now the imputation of lightness and immorality, provided that it fall short of the very carnal offence, is without remedy; and the above grudging concession to the female sex is restricted to them; and for men the ruling of *Lumby* v. *Allday* is still law[2], though a man's reputation for decency and courage is not less dear to him than her fair fame is to a woman.

To render the confusion of the intelligent foreigner under our examination yet more confounded, it is merely necessary to tell him that if the slandered woman happened to be a citizen of London or Bristol, her character might be vindicated. And that this is not due to the fact that these cities are more enlightened, but that in these municipalities it was the custom to whip the approved meretrix at the cart's tail.

If, dropping the form of interrogation, you were to tell him that the editor of a newspaper, who, in perfectly good faith, had published the incorrect but innocent statement that a certain cantatrice

[1] A Thesis for the Degree of LL.D., Cambridge.
[2] 1 Cr. & J. 301; 1 Tyr. 217; 35 R. R. 715.

was the mother of a lady of like profession, had to pay the sum of two thousand pounds compensation to the alleged parent; our examinee might shrug his shoulders and tell us, 'C'est magnifique, mais ce n'est pas la raison.' But at the proposition, that to say of a solicitor, in the presence of hundreds of people, that he had been guilty of fraud on his creditors and been whipped off a race-course, was not actionable; he might well wonderingly ask where was the boasted equality of Englishmen before the law, when there was this great difference between the respective liabilities of the libeller and slanderer. And he might equally well ask whether 'ubi jus, ibi remedium' was anything else than a mere insulting sham.

In short, then, the modern English Law of Defamation apparently consists of a series of exceptions to the commonly accepted and *de facto* Common Law rule in favour of unbridled licence of speech; and it does not argue much for the science or design of the system that the exception which is latest in point of date should bulk so large as to amount to a great, sound, and comprehensive rule in itself. By reason of its having been built in this way, and of what I shall endeavour to show is a false historical assumption, reputation is worse protected with us than perhaps with any civilized nation in the world. In this respect we are sharing to some extent the fate of the Roman Contractual system; formal in character, but with some contracts privileged to be formless. And the measure of the comparative failure of the Roman Contractual system, as contrasted with Contract, as interpreted by the doctrine of Consideration, is the measure of the inadequacy of our law of Defamation.

The following extracts will serve to illustrate the differences in ground and conception of the offence between our own system and that of other peoples who have inherited or been influenced by saner notions.

By the Code of Athens (Petit. Leges Atticae, p. 536), 'Vetitum quoque lege erat objicere quod clypeum abjecisset; qui hoc convicium fecerit quingentis drachmis multabatur.'

ἐὰν δέ τις φασκῇ ἀποβεβλῆκεναι τὴν ἀσπίδα, ὑπόδικον εἶναι.

The Roman law is concisely stated in the Institutes, in the passage beginning: 'Injuria autem committitur . . .' (J. iv. iv. 1).

The French law is eminently Justinianean. Loi de Mai 17, 1819. Defamation is:—

'Toute allégation ou imputation d'un fait qui porte atteinte à l'honneur ou à la considération de la personne ou du corps auquel le fait est imputé. . . . soit par des discours, des cris ou menaces proférés dans les lieux ou les réunions publiques; soit par des écrits, des imprimés, des dessins, des gravures, des peintures, ou emblèmes vendus ou distribués, mis en vente ou exposés dans

les lieux et les réunions publiques; soit par des placards et affiches exposés au regard du publique.'

Geographically speaking, Scottish law is nearest; and the difference is both marked and edifying. A very clear statement is contained in a judgment in *Aitken* v. *Reat*, reported in 7 Murrell, p. 149: 'By the law of Scotland, anything defamatory is the foundation of an action.'

According to Scottish law, in an action for Defamation, there are two matters to be taken into account in considering the question of damages, viz., the injury or loss suffered, actual or probable, for which reparation is sought: and the insult or offence to the individual for which solatium is due. Thus in Scotland an action lies for slander contained in an unpublished letter sent to the pursuer, or uttered to himself when no third person is present. But words which would found an action if addressed to a third party, may not do so when addressed to the party alone who complains of them.

As against the generous comprehensiveness of the foregoing, we may set forth the exceptional cases under English law, in which a defamatory statement is actionable: i. e. the cases where an attack on reputation is actionable, not *quoad* defamatory, but *quoad* something else.

I. If an indictable offence be imputed (i. e. Not because it tends to the taking away of reputation, but because it may tend to the deprivation of liberty).

II. If it impute a contagious disorder (i. e. Because it tends to deprive one of the *consortium vicinorum* on the ground of physical, not moral taint. The higher standards of decent conversation, and the advance in medical skill, have tended to whittle this to the vanishing point).

III. If the imputation affect a man's reputation for skill and address in his business, office, trade, profession, or occupation; or tend to cause his present position to be prejudicially affected (i. e. Because his pecuniary emoluments may therefore tend to decrease or disappear, or that he may lose his present *locus standi*).

IV. When the imputation tends to the disinherison of the plaintiff (i. e. Not because of the stain cast on his birth or his mother's fair fame; but because he ran the risk of losing his landed inheritance. Wherefore, if he were no heir he would not by the law be regarded as aggrieved. This developed into what has now become the substantive Tort of Slander of Title. Special damage is the gist of the action, and the fact whether the slander is spoken or written is immaterial).

V. When the imputation is of a breach of the Seventh Commandment on the part of a female plaintiff.

VI. When the imputation produces temporal loss. (Here is perhaps the poison of the atrophy. It would seem to be a halting prototype of Consideration in Contract.)

VII. If the imputation tend ad Scandalum Magnatum. This exception was abolished by the Statute Law Revision Act.

VIII. If the imputation be conveyed by writing, signs, pictures, or any mechanical means of securing *de facto* permanence.

The last exception is modern in point of date and universal in character, and is called the Law of Libel. The first seven make or made up the Law of Slander, and it bulks extremely small in our present system. Two questions, then, are propounded or rather suggested for solution. The first is: Why is our law (as to part) so unenlightened, and so inadequately provided? The second is: When did that dichotomy which made our law unique arise, and what were the reasons that contributed to render it possible?

In modern text-books of authority, two reasons are wont to be assigned as in common accounting for the truth and reasonableness of the above propositions. These reasons are rather respectable from their antiquity than cogent from their inherent soundness; indeed, it is difficult to think that acute and eminent authorities (as many are) can have any real belief in the reasons they propound. But it is well to clear the ground for an attempt at a critical examination of the whole field, by stating these alleged reasons, together with what are conceived to be the obvious proofs of their inefficacy. But for the fact of their prevalence, nothing further than a mere statement would be necessary in order to demonstrate their impossibility.

For the very acme of the complacent panegyric with which these reasons are set forth, one must refer to books of the earlier part of the nineteenth century; such as Holt's History of the Law of Libel, and Starkie's Law of Slander and Libel, published soon after the former work in 1830.

The first reason is, that written defamation necessarily implies a superior degree of malice over that which may inspire words that are spoken in the heat of passionate argument. Which perforce conducts us to the following *reductio ad absurdum*. I quote from a paper read by a member of the bar, Mr. John R. Fisher, at a meeting of the Institute of Journalists held in the Hall of Lincoln's Inn:—

'And here comes in our complaint against English law; not that it punishes defamation too severely, but that in a great class of cases at least, it punishes the wrong man, and that man a journalist. If a speaker at a public meeting, speaking with the utmost deliberation, and with the knowledge that his words are being taken down

for publication in the public newspapers, makes by accident or design an incorrect or untruthful statement in dispraise of an opponent, and yet so frames his words that in the absence of special damage he does not expose himself to an action for slander, that speaker goes free and unpunished. . . . But mark the difference when the journalist comes on the scene. Says the law: "These words on passing into print have become actionable. With the speaker, the author and publisher of the words, we have nothing to do. It is for you, the journalist, to justify them." And all this on the assumption that the journalist is guilty of a superior degree of malice.'

I may here remark that I entirely disassociate myself from the opinion hinted at in the first section of the quotation. For I can see no hardship in making a newspaper reporter or proprietor liable for the truth of a reported speech; in other words, answering to the duty of Insurance which is laid down in *May* v. *Burdett*[1], and *Fletcher* v. *Rylands*[2]. He carries on a vocation for his own profit which teems with opportunities for abuse: why then should he not pay when his printed matter transcends the limits of fair comment? He is not compelled to run a newspaper!

The other reason is often expressed in a trite pentameter:

'Vox emissa volat; littera scripta manet.'

Wherefore it comes to pass that he who said of a churchwarden in a crowded market-place, 'Who stole the parish bell-ropes, you scamping rascal?' got off scot-free, as it was the imputation of a legally impossible offence (*Jackson* v. *Adams*, 2 Bing. N. C. 402; 42 R. R. 633). But an innocent misstatement in an outlandish newspaper would render the publisher liable to the suit of any one who might regard himself as aggrieved, even if the newspaper were Welsh, i. e. printed in a language which neither the plaintiff nor his friends could understand. The former statement might be told over three counties, the latter might never be connected with a definite living person, save through the clerk of a press-cutting agency as inspired by a speculating practitioner. Yet the former offence wins impunity; the latter swingeing damages. And yet, as a matter of fact, for nine-tenths or more of English citizens, reputation depends on what is said and not on what is printed. As a ground of the dichotomy, the superior permanence commonly alleged is contrary both to reason and probability. The issue of a newspaper can be stopped, copies can be called in, an apology and a withdrawal can be put in chase of the libel; but who has ears to trace the beginning of a slander, what tongue is loud enough to give it everywhere the lie, or what injunction can prevent its multiplication infinitely or for ever?

[1] 9 Q. B. 101; 16 L. J. Q. B. 64.
[2] L. R. 1 Ex. 265; 3 H. L. 330.

Not so easy of discovery or positive of statement are the reasons, social, historical, and political, which have wrought our law to its stunted onesidedness. They are to be sought in the records of old jurisdictions, sacred and secular, with which the King's Courts all but refused to compete; and the grounds of its atrophy are in part to be looked for in the story of the decay of these, as in the fatuous assumption that there was no Common Law save that which the King himself administered in his own Courts. It is to be sought in that same lack of adaptability of the judiciary which in part defeated the wise purpose of the Common Law Procedure Acts; in that residuary jurisdiction exercised by the Crown in Council, whether over him who could not produce the first author of some 'horrible tale,' or whether in that tyrannous inquisition which Henry made and the Long Parliament abolished. It is to be sought in the positive morality of the sixteenth and seventeenth centuries; for when a man in holy orders could do as Skelton (rightly named Vicar of Hell) did, and write as he wrote, how could the decencies of conversation or criticism be expected from the laity? And in that other rule of positive morality, too; that which constrained the gentleman to redress his slandered fame on the body of his traducer, with the argument of the sharpened sword and pointed lance, rather than by means of the hired advocate; in the lists, not in the law court. And lastly, in the introduction of the rule of a Roman criminal process, after transmuted to civil, which was a consequence of that stability of our law which at times defeats itself. And yet at two, or perhaps three, junctures our Law of Defamation only just missed becoming as elastic and sane as that of any other system.

More than a thousand years ago the great King of the West Saxons in his laws made provision for the good name of his subjects. This is the law of Ælfred: 'Si quis publicum mendacium confingat, et in ipsum denique firmetur, non emendetur hoc aliqua levi re, sed amputetur ei lingua, nec minori pretio redimi possit quam secundum veram ejus adpreciabitur' (Quadripartitus, *ed.* Liebermann, p. 67).

Nor by the time of King Edward had the scope of the offence contracted.

Bracton, in the reign of Henry the Third, states the law in nearly the language of the Institutes.

In 1275 a series of Acts of class legislation commenced, for the protection of those who on account of their own dignity or the comparative obscurity of their defamers could not or would not avail themselves of what usual methods of redress then obtained. 3 Edward I, c. 34, is the first of the Statutes De Scandalis

Magnatum. Hereunder follows the wording of the Act, certain unessentials having been omitted:—

'Whereasmuch as there have been oftentimes found . . . devisers of tales whereby . . . discord hath arisen between the king and his people or great men of this realm . . . it is commanded that . . . none be so hardy as to tell . . . whereby occasion of slander may grow between the king, &c.; he that doth so shall be taken and kept in prison until he hath brought him into Court which was first author of the tale' (Statutes at Large, I, 97).

2 Richard II, c. 5, is similar in wording and effect. It however particularizes the persons who are to benefit by the Statute, thus explaining the earlier Act. It defines 'great men of the Realm' as 'Prelates, Dukes, Earls, Barons, and great men of the Realm, and also of the Chancellor, Treasurer, Clerk of the Privy Seal, Steward of the King's House, Justices of the one Bench or the other, and of other great officers of this Realm' (Statutes at Large, II).

12 Richard II, c. 11, recites the previous Statutes of Westminster the First and Gloucester, and then proceeds:—

'It is accorded and agreed in this Parliament that when any such deviser is taken and imprisoned and cannot find him by whom the speech is moved, as before is said, that he be punished by the advice of the said Council, notwithstanding the said statutes' (Statutes at Large, II, 305).

These last words I regard as of consummate importance, in that, to my mind, they mark the very germ of the modern distinction between spoken and written slander.

The slightest acquaintance with the political songs current in the days of the Plantagenets will answer any question as to the rationale or need for these Statutes. The following is taken from a song popular in the time of Edward the First[1]:—

'Sunt Justitiarii
Quos favor et denarii
Alliciunt a jure;
Hi nam sunt bene recolo,
Qui censum dant diabolo
Et serviunt hii pure.
Nam jubet lex Naturae,
Quod judex in judicio
Nec prece nec pretio
Acceptor sit personae;
Quid, Jhesu ergo bone,
Fiet de judicibus
Qui prece vel muneribus
Cedunt a ratione.'

The action on the Statute was framed 'tam pro domino Rege quam pro seipso,' i.e. it had both a civil and a criminal aspect.

[1] This stanza appears at p. 225 in the Political Songs of England, edited by Mr. T. Wright, M.A. (Camden Society Publications, 1839.)

But the civil remedy was at first little used, as it appears from Lord Townsend and Dr. Hughes that the first action of this kind was brought in 13 Henry VII, this being an interval of more than a hundred years from the passing of the last statute. The above case is reported in 10 Rep. p. 75. The criminal remedy was pursued in the King's Council, sitting, it is conjectured, in the Starred Chamber, as the White Chamber, the Painted Chamber, and the Chambre Markolph were occupied by the Triers and Receivers of Petitions.

Crompton sufficiently proves this in his book entitled 'L'Authorite et Jurisdiction des Courtes de la Majeste de la Roygne,' published in 1594. In discussing the powers of the Star Chamber, he says:— 'Poient punier parlers de faux novels, et faux messages de nobles et auters conter,' 13 Ric. II, c. 11. Then he gives a reference to the cases of the Duke of Buckingham and Lord Daburgenie.

The action was extended by judicial interpretation, so as to be competent to members of other ranks in the nobility than those in existence at the time of and enumerated by the statute. Thus a viscount was entitled to the action, though the rank was not bestowed till 18 Henry VI, 1440, when it was conferred on John Beaumont. A female, noble by birth, was not within the scope of the statute. The Act of Union with Scotland provided indirectly for the extension of the competency of this action to Scottish peers, although such were not Lords of Parliament. The interpretation of the statutes, as may be expected, was liberal, and the words which formed good grounds for the action in various cases are mild enough. 'My Lord P. is an unworthy man, and acts against law and reason.' 'My Lord cares not how he comes by goods.'

Townsend v. *Hughes* was an action for uttering the former words. The case was tried, not guilty having been pleaded, and a verdict for four thousand pounds awarded. Motion was made in arrest of judgment, and Pemberton's argument against the motion is significant: to the effect that it was the end and object of these statutes to give a remedy against all provoking and vilifying words which were used before to exasperate the peers, and to make them betake themselves to arms and to carve out their own redress with the sword.

By the time of Elizabeth, however, it is certain that the Star Chamber had come to the practice of hearing cases of ordinary slander and deciding them in the way of criminal proceedings. The two cases immediately following are extracted from Crompton:—

'Un Smith de Comitatu Somerset fuit fined in ceo Court (de Star Chambre) pur slanderous parols que il aver parle dun Sir John Young Chivaler, que touche sa vie, queux le dit Smith ne poit prover, et fuit commit, et rendoit grand damages al Chivaler, et

encore il poit aver action sur le case al common ley' (Crompton, Jurisdiction of Courts, p. 33).

'Un L... de Kent fut puny in cel Court pur fauxment et maliciousment going about de prover un que fuit son cosin ou frere d'estre traytor, et pur cel il fuit order de chivaucher circa Westminster Hall ove son face al taile del chival circa 27 Elizabeth come jeo oye.'

The next is taken from Dugdale, and is not uninteresting in view of the connexions of the parties. It is cited, *sub titulo, Sir Robert Dudley* v. *The Countess of Leicester.*

Elizabeth's Earl of Leicester had a son in 1573 by his sometime mistress, Lady Sheffield. This son in the reign of James the First took steps to prove his own legitimacy, and consequently the invalidity of the marriage of the Countess of Leicester, formerly Lettice Knollys. Whereupon the Duchess procured Sir Edward Coke, the King's A.-G., to exhibit a Bill in the Star Chamber against the same Robert and Dame Alice his lady, as also against the said Lady Douglass Sheffield (Robert's mother), then wife of Sir E. Strafford,... and others, charging them in conspiracy to defame the said Lady Lettice.

But the remedy given by these statutes was foreign to the spirit of the English law: no action of the kind appears in the books of a date later than 1710, and in 1887 it was abolished by the Statute Law Revision Act, 50 & 51 Vic. c. 59.

Thus far the King in his own Court had provided a means of vindication for the aspersed honour of his nobler lieges did they choose to avail themselves thereof, but for his humbler subjects matters were different. For the better among them it seemed an ignoble thing to approve their worship otherwise than in the duel; while for the mass of the population the King's Courts were very far off, and, moreover, a cheaper, a more familiar, and perhaps a more trusted competing jurisdiction at their very doors. Or maybe it was not even a competing remedy or jurisdiction, inasmuch as it may be claimed that it is inconceivable that early Judges should have been ignorant of this, and so it may be assumed that they did not feel themselves called upon to give any alternative remedy. For where tenants were there was also a feudal landlord, and where a landlord, often enough seignorial jurisdictions. Or perhaps communal or municipal jurisdictions became seignorial; wherefore the poor man went to the local representatives of the King's prerogative of justice, to a lord who held the franchise, or the regalities as was said. In these Courts the plaintiff was known, and his smirched reputation was cleansed in the ears of those very persons in whose presence he had been reviled. And

that this was so is clear enough from a comparison of the sets of official records—those set forth in the Year Books and those in many a Court Roll. In the former we find a beggarly and poverty-stricken list of cases, in the latter they occur every court-day. In the Reports of Elizabeth's day cases crowd thickly enough, but by that time the Manorial Courts had all but done their work and were over-ripe and decaying. But it is in the records of Sessions of Manorial Courts that the earlier history of the tort is to be looked for, though not there alone.

It is possible, however, that as a matter of fact the tort did receive more attention in the King's Court (as a consequence of the Statute of Westminster) than is generally supposed. The question is one which is tedious, but otherwise easy of solution, and it is best set forth in the Report of *Sir Herbert Crofts* v. *Brown* (3 Bulstrode, 167). The case was tried before Coke, and contains the following *obiter dictum* of the L. C. J.: 'There are not three cases of slanderous words between 1 & 5 Edward III.' The dictum, it is submitted, will admit of three possible explanations. Firstly, that there is a misprint on the part of the printer with regard to the period referred to, i. e. that it should read 'between 1 Edward III and 5 Edward IV or V.' But this is not a feasible or accountable error. Secondly, the reporter may have made a mistake. Coke might have said, 'There is no case,' &c. But if Coke meant that, why did he specify that particular quinquennium? Or thirdly, the printer and reporter may both have been right; Coke may have actually said the words as reported, and had in his mind at the time cases with which he was personally acquainted either from a perusal of the original records or of transcripts in his own possession. The question, however, is interesting merely, not vital[1].

Professor Maitland in his 'Select Pleas in Manorial Courts,' edited for the Selden Society, thus states the competence of the seignorial jurisdiction:—

'We find a number of petty offences are presented, and those guilty of them amerced; some of these offences are merely manorial . . ., but others of these offences are petty misdemeanours against the general law of the realm; this man has committed an assault, that one is not in Frankpledge, this woman has broken the assize of beer, that woman has made too free a use of the English equivalent of Meretrix.'

The causes of defamation on the manorial rolls show us the working of a constantly exercised jurisdiction, one certain and severe enough to curb the railing tongues of lewd fellows and

[1] I think the text must be corrupt.—Ed.

viragoes of the baser sort to a decency of compliance with the duty towards one's neighbour. The following excerpts are taken from the above-mentioned book, and they manifest more of *sensus communis* than of that *nimia subtilitas* which obtained in the real actions in a more exalted judicature. Which is as it should have been and might have been expected to be, when men of the most law-abiding race in the whole world set about to manage their own affairs for peace and quietness in their own way. There is little refinement or drawing of distinctions, not overmuch quibbling as to the existence of special damage, no sort of privilege on the part of either plaintiff or defendant, that the former may have the law for certain words, that the latter may vilipend at will if he but exercise sufficient discretion to keep off the forbidden ground. 'If you bear false witness against your neighbour,' they seemed to say, 'you do it at your peril of either justifying or paying. And if you have put your tongue to a lie so as to have caused shame or huntage, you pay.'

Manorial Court of the Abbey of Bec, holden at Ogbourne, Wilts, April, 1290:—

'Peter Kiwell says that William Viner has grievously defamed him by asserting in public that he, Peter, is a false man, full of frauds, and a picker of quarrels. Ad dampnum suum &c.' Quirk, Gammon, & Snap would surely hesitate to take such a case into court now!

William Viner, the defendant herein, was a plain wastrel. On the very same court-day he was convicted by the oath of six lawful men of having been the cause of a contention that had arisen between himself and one Maud, and also was commanded to pay the aforesaid Maud the two shillings that he had undertaken to pay in respect of an assault which he had committed against her.

The Court of the Fair of St. Ives, holden May 3, 1275:—

'Thomas complains of Maud, wife of John Woodfull, because the said Maud against the peace of the Lord Abbot and the Bailiffs of the Fair, attacked the wife of the said Thomas, violenter verbis contumeliosis insultavit vocando ipsam sorceram et meretricem, and violently assailed her with a certain measure of yeast . . . ad dampnum suum III*d.* et ad vituperium suum.'

'The said Maud is present and defends the words of Court, and the damage and dishonour of the said Thomas, and is ready to do what the Court shall award to prove that she did not assault with vile words. . . . And she is at her law.'

She gives pledges, and an inquest is ordered.

In less than ten days after Maud came and withdrew herself against her law against Thomas of London. 'Therefore let Thomas

recover his damages by the taxation of the court, and the said Maud be in mercy 10*d.*'

It is very curious how sensitive they were. Everything that might by even a fastidiously minded person be regarded as militating against personal honour was cognizable. Thus Ralph Haven complains of Alan Cobbler of St. Ives that the latter had bought and received from him so many hides, value eight shillings, 'which Alan will neither return nor pay for ad dampnum et vituperium 6*s.* 8*d.*'

Here is another case, tried at Bridgwaltham in 1293, which shows how smoothly and with what remarkable absence of merely vexatious litigation the system worked. 'Richard Young gives the lord 6*d.* to have aid "de quadam diffamacione et injuria sibi illata per Elenam."' It is found by inquest that at the instance of the said Elen, Richard has been damaged in his estate to the amount of five shillings. 'Et idem Ricardus remittit ei pro bono pacis pro XII*d.*'

This seignorial competence was not a thing that was exercised rarely or in few manors, it was an *adsidua jurisdictio.* In the Selden Society publication for 1891, edited by Professor Maitland and Mr. Baildon, we have a collection of formularies for the holding of and of the transactions in the Curia Baronis, dating between 1272 and 1377. From the first collection it is possible to find three precedents of slander cases out of the first eight, a proportion which it would be impossible to parallel nowadays.

A precedent on page 40 is particularly instructive, as showing how completely effected was the break between the old law and the new:—

'William Vinter of Woodstock complains of Robert Baker that wrongfully he supplanted him of a tun of wine of a merchant of Southampton, Bernard Taneys by name, which he the plaintiff bought of him, Bernard, for 36 shillings, . . this done, came the said Robert, and in despite of William spoke so much ill and villainy of him to the merchant . . . so that the merchant increased the price of the tun to 40 shillings, and the said William hired a cart with four horses for half a mark to carry the tun from Southampton to his house at Woodstock; and when he came to Southampton he found that owing to what Robert had said, the merchant was now of another mind, and that he would not let him have the wine, and told him right out that he had heard so much evil of him that he would give him no credit . . . so that wrongfully and without reason did he Robert speak evil of and procure evil for the said William a son damage de XL. shillings, et huntage C. shillings.'

At the next Court the Steward puts the question to Robert Baker, the defendant, who appears before him, 'Art thou come as come thou oughtest?'

'No, my lord; I have not got folk so readily.' (He could not get his pledges.)

'And therefore doth this Court award that thou be in the lord's mercy, and that thou make amends to William &c.'

In the collection entitled 'Curia Episcopi Eliensis apud Littleport' we find a precedent of another class of cases whereof the Royal Courts took no notice:—

'Compertum est per inquisitionem quod Alicia uxor Wilhelmi le Huxture defamavit Mabeliam uxorem Ricardi Mauntele, unde eadem Mabelia deteriorata fuit in capitulo ad dampnum ipsorum Ricardi et Mabeliae XL*d.*'

Sometimes the lord's justice was impugned, but they had a short way with such malcontents. An inquest is held, and finds that the husband of the slandered woman in the above case (apparently dissatisfied with the amount of the compensation) held converse with William of Hilgey, the two maliciously defaming the lord's court, saying that no man can get justice there. They are fined two shillings and twelve pence respectively.

Apparently insult might balance insult. Rohese Bindabere and Ralph Bolay exchange the epithets Latro and Meretrix. Both are in mercy:—

'And for that the trespass done to the said Ralph exceeds the trespass done to the said Rohese, as has been found, therefore it is considered that the said Ralph do recover from the said Rohese 12*d.* for his taxed damages.'

In the event of each accusation being true, the former epithet would have exposed Ralph to a harder justice than that which would have taken cognizance of Rohese, and perhaps reasonings such as this may in some degree account for that defect, which was remedied by 54 & 55 Vic. c. 51.

The acumen of Professor Maitland has laid its finger on the very crux of the error which imbued Elizabethan and later judges with their bias against actions for slanderous words:—

'We ought to remember,' he says, 'that the King's Court never by any formal act or declaration took upon itself to enforce the whole law of the land. Only by degrees, and owing to the decay of the local courts, did its catalogue of forms of action become the one standard of English law. This is shown in the history of defamation, the local courts gave a remedy against the slanderer while as yet the King's Courts gave none.'

Meanwhile the Church had her jurisdiction—and directly and indirectly perhaps it may be said that her influence was a greater restraint of slander than even the cognizance of the Courts purely

secular. For her influence was not confined to the Courts professedly Christian. She was an immense landed proprietor; whether in her corporate capacity or whether in the persons of her greater sons. Odo, Bishop of Bayeux, the Conqueror's brother, had Manors which lay within seventeen different counties. And these jurisdictions which the Church exercised, though professedly secular, were in fact exercised by religious persons whose standards must have reacted on their jurisprudence. And the authority of this did not begin and end with their own Courts. Likewise she had another competence in virtue of her non-secular sanctions. She was answerable for the cleanliness of folks' lives, and she stayed the tongue of the defamer at once *pro custodia morum* of the community, and *pro salute animae* of the delinquent.

The Church dates her separate jurisdiction herein from the ordinance of the Conqueror:—

'Propterea mando et regia auctoritate praecipio ut nullus episcopus vel archidiaconus de legibus episcopalibus amplius in hundret placita teneant, nec causam quae ad regimen animarum pertinet ad judicium secularium hominum adducant.'

Defamation is not mentioned here, but in later statutes we have it specifically referred to. 13 Edward I, c. 1, 'Circumspecte agatis,' e. g. 'Certain cases wherein the King's prohibition doth not lie.'

'And in cause of defamation it hath been granted already that it shall be tried in a Spiritual Court where money is not demanded.' Which is perhaps responsible for a very great deal.

9 Edward II, c. 4. 'Articuli cleri.' Corporal penance in defamation may be commuted for a money payment:—

'In defamation also Prelates shall correct in manner aforesaid, the King's prohibition notwithstanding. First enjoyning a penance corporal, which, if the offender shall redeem, the Prelate may freely receive the money.'

2 Edward III, c. 11, puts a new limit on the competence of the Church. It is not so to be exercised as to deter from the prosecution of offenders before the King's Justices:—

'When divers persons have been indicted, as well clerks as lay people . . . after their deliverance they do sue in the Spiritual Court, surmising against them that have defamed them, to the great damage of the indictors . . . the King wills that in every such case, every man that feeleth himself grieved thereby shall have a prohibition framed in the Chancery upon his case.'

But these restrictions lent strength to all that to which they did not apply—like hoops about a barrel.

From the Decretals it appears that there were three methods of prosecution for defamation in the Ecclesiastical Courts: by Inquisi-

tion, Accusation, and Denunciation. These methods all had within themselves the germ of that unpopularity, or worse, which after the lapse of centuries produced their abolition as not consonant with the free genius of a people essentially Puritan.

In the case of proceeding by inquisition, the judge himself was in fact the accuser. He was at liberty to proceed against the party either from his own personal knowledge of offence committed, or on grounds no more certain than those of mere popular rumour. The only other step necessary to bring the party before the Court was Citation.

This was the more usual method, and the Apparitors of the different Courts who attended the Ecclesiastical Judges at the times of their visitations and during session, and otherwise busied themselves in discovering cases of delinquency, were the chief means of bringing such to the notice of the Judges. The Court, then, without further information, would cite the parties to appear. These extortionate and tyrannical Apparitors were the objects of intense popular dislike, and the prejudice against a peculiarly obnoxious variety of the common Informer was well known and common enough to cause Chaucer to include a reference thereto in the Canterbury Tales. It occurs in the Prologue to the Frere's Tale:—

> 'I wil yow of a Sompnour tell a game;
> Parde, you well may knowe by the name,
> That of a Sompnour may no good be sayd;
> . . . . . .
> A Sompnour is a renner up and down
> With maundamentz . . .
> And is y-bete at every tounes end.'

Accusation is the method in which an accuser voluntarily comes forward. Promoting, as was said, the office of the judge.

Denunciation, the third mode, differed from accusation in this, that the person who gave the information to the judge was not bound to come forward as the accuser; nor was he subject to the conditions and penalties to which the accuser was liable in order to compel him to carry on the suit.

A vivid picture of the procedure in the Ecclesiastical Courts may be seen in an English political satire of the time of Edward I (English Political Songs, Camden Society, at p. 155. The volume was edited by Mr. Thos. Wright, M.A.).

This jurisdiction of the Church may be here conveniently followed to its close. Even before the Commonwealth it had received its death-blow, and 13 Charles II, c. 12, s. 4, removed the possibility of its convalescence. 16 Charles I, c. 4, the same statute as that which abolished the Court of High Commission, took away the oath ex officio:—

'No spiritual . . . or ecclesiastical judge shall impose . . . any pain or corporal punishment . . . for any . . . matter or thing whatsoever belonging to spiritual cognizance, or shall ex officio or at the instance of any person whatsoever . . . minister . . . any corporal oath . . . to confess or accuse himself of any crime offence delinquency or misdemeanour . . . by reason whereof he shall be made liable to any censure pain or punishment.'

The post-Restoration Statute is even stronger:—

'Provided also that it shall not be lawful for any archbishop, bishop, vicar-general, chancellor, commissary, or any other spiritual judge or officer or minister, or any other person having or executing spiritual or ecclesiastical jurisdiction to tender or administer to any person whatsoever the oath usually called the Oath ex Officio, or any other oath, whereby such person to whom the oath is tendered or administered may be charged or compelled to confess or accuse or to purge him or her self of any criminal matter or thing, whereby he or she may be liable to censure or punishment. Anything in this statute or any other law, custom, or usage heretofore to the contrary hereof in any wise notwithstanding.'

From this time henceforth the jurisdiction survived in theory without any adequate means of enforcing it, but it was at last abolished even in theory by 18 & 19 Vic. c. 41. The preamble of this Act recites:—

'Whereas the jurisdiction of the ecclesiastical courts in suits for defamation has ceased to be the means of enforcing the spiritual discipline of the Church, and has become grievous and oppressive to the subjects of this realm:—

It shall not be lawful for any ecclesiastical court to entertain any suit for or cause of defamation, any statute, law, canon, custom, or usage to the contrary notwithstanding.'

Then it goes on to enact in the second section:—

'that all persons in custody for defamation under the order of ecclesiastical courts are to be discharged.'

A number of very interesting causes in Defamation are to be found in Archdeacon Hale's Precedents—a collection of ecclesiastical proceedings collated by him from various sources. The records from which his excerpts are made extend over a period of one hundred and thirty-five years, and are as follows:—

The Act Book of the Consistory Court of London, 1475–1539.
Of the Archidiaconal Court of Colchester, 1540–1544.
Of the Consistory Court of London for the same date.
Of the Court of the Vicar-General of London, 1554–1555.
Of the Archidiaconal Court of London, 1562–1563.
Of the Archidiaconal Court of Essex, 1566–1610.

Out of a total selection of some seven hundred cases, between five and six per cent. are of Defamation; and as may be inferred from

the fact that the immense majority of cases are for lapses from sexual morality, so the majority of the slanders alleged are those which impute the same offence.

A few of the more typical cases are subjoined.

'Uxor Wilhelmi Symsqn communis diffamator vicinorum, et praesertim diffamavit Joannam Rede, sic dicendo de eadem quod sponsus ejusdem Joannae esset stultus . . . quod eadem Joanna est communis meretrix, et eciam quidem cippus argenti precii XL furatus esset etc.'

'Fatuus' here seems to be a very mild term to deserve special record.

'Nicolaus Calff et Radulphus Austin communes sussurrones . . . nomina sinistra sacerdotibus imponentes Anglice . . . etiam sic dicendo,' 'I would there was never a Priest in England.'

'Notatur officio Thomas High et alius quod sunt diffamatores populi Domini Regis, et praesertim cujusdam Hugonis Vaughan sic dicendo quod ipse Hugo fuit de consilio quorumdam virorum qui clam et furtive subtraxerunt certos equos.'

In another case the words complained of are:—'I will make thee to bear a faggot the whiche heretickes (as thou art one off them) were wont to beare.'

Elena Daylok is presented as Communis Skandalizatrix.

'Dominus Robertos Rector notatur officio quod est communis diffamator, et praesertim diffamavit Aliciam Hall, dicendo quod furtive subripuit duos anulos cujusdam Roberti Draper.'

'Wilhelmus Sevill, quod diffamavit Thomas Ward sic malitiose dicendo,' 'Go forth, fole; and set a cockscomb on thi crown.'

In another case the slander is to the effect that the wife had drugged the husband's medicine to intoxicate him.

Even the Apparitor, seasoned as he was to abuse, sometimes turned and prosecuted the revilers, as one to whom was said in the presence of many: 'By Gode's body, I will make thee and that Parson to for til repent except thou tell me who present this article against me.'

'Arthurus Dixon contra Elenam Cordie. Fassa est that she willed the said A. D. to take a sawe and sawe off his horns.' This is very briefly reported. It would be interesting to know whether the Dixons, husband and wife, were conceived of as injured, or whether the injury was of the woman alone. This is an early and obvious sample of slander by innuendo. Had the same case been brought a hundred years later in the Court of King's Bench, doubtless some preposterous 'mitior sensus' would have been given to the words complained of. And it is equally certain that the palliation would have been introduced by the recurrent formula, 'For it might be intended' that Elena spake of the horns of his beasts.

There were three cases of defamation written, though no distinction seems to have been taken on that ground. They are curiously modern. I quote two of them. 'Thomas Ellis of Boreham detected that he hath repeated a ryme upon the names of sundry men and women in this parish.' Semble: That Ellis wrote the same. Certain others in a different district 'detected for that they have made a filthy rime of the most part of the inhabitants of this parish.'

The ecclesiastical penance for this kind of offence in the majority of cases was for the defendant to acknowledge the baselessness of the allegation and ask the forgiveness of the person defamed in the vestry room in the presence of the clergyman and churchwardens of the parish. Which is a curious anticipation of the punishments that Bentham thought fitting as the sanctions of such offences.

The crippled jurisdiction, however, still survived even the post-Restoration Act cited above, and the offence (was it a tort?) was defined and limited anew in a brief series of important cases. The offence alleged in the scandal must be one not punishable at common law (*Crompton* v. *Butler*, Haggard, i. 465). This is a distinct set back from the case of Thomas High above. And conversely, the offence alleged must be one which would be punishable in the Court Christian (*Crompton* v. *Butler*, loc. cit.). Thus it was not defamatory in the ecclesiastical courts to say that a person was a common swearer, a sower of sedition and faction, or a drunkard. But it is defamatory to say that a person is an usurer, as Statute 13 Elizabeth, c. 8 expressly saves the ecclesiastical jurisdiction herein. Likewise circumlocutions were defamatory, provided that they were fairly patient of a defamatory meaning. But in *Ware* v. *Johnson* (Lee, ii. 103) it is expressly laid down that there is no distinction to be taken between spoken and written slander.

The limitation of the period during which such suits had to be brought was reasonable enough. It was one year originally, but a statutory alteration was made by 27 Geo. III, c. 44, s. 1. This enacted that all such suits were to be barred unless they were brought within six months of the propagation of the slander.

According to Oughton, 'In causa diffamationis non est omnino admittenda pars in forma pauperis.'

For some hundreds of years, then, the bulk of the nation had found a remedy against defamation in Courts seignorial and ecclesiastical. From the time of the first Statute de Scandalis Magnatum a limited aristocracy, official or otherwise, had found protection in royal justice, or could have done did they seek it. But this remedy was probably only applied in cases where caste prejudice or bureaucratic dignity would have regarded a meeting

as impossible. The lesser baron could and would himself disprove the reflection on his courage on the body of his traducer. Thus Varney and Tresillian in Kenilworth. Richard's Statutes were really designed to gag the mouths of Langland and those of his kidney in the days of the villeins' revolt. But what remedy was there in the jurisdiction of the King's ordinary Courts? How far did his justices of either bench compete with these local Courts? The answer is to be found in the Year Books, or, better still, in those faithful mirrors of what practising lawyers conceived of as being the law, the Abridgements.

FRANK CARR.

[*To be continued.*]

THE DIFFERENTIATION OF CAPITAL AND INCOME.

THE writer believes that no apology is needed in introducing this subject, which is one of considerable importance to all capitalists, and as a special subject, probably owing to the scantiness of its materials, has hitherto failed to attract any text-writer. Such law as exists is mainly found in that relating to partnership and companies. The object of this article will be to discuss the general principles which can be derived from the cases which touch on the matter.

It will readily appear that the main question underlying the subject is whether under the circumstances of each particular case profits of the business concerned have ceased to be profits and have become capital. Sometimes it is difficult to discern whether a tributary is part of the main stream, so is it occasionally with the flow of capital and profits. 'What are profits and what is capital may be a difficult and sometimes an almost impossible problem to solve' (Lord Halsbury in *Dovey* v. *Cory*[1]).

It is proposed to proceed with our inquiry under the following heads: (1) the ascertainment of profits; (2) by whom capitalization of profits can be effected; (3) what amounts to an intention to capitalize profits.

The Ascertainment of Profits.

Under this heading it is proposed to consider (*1*) the general rule; (2) special circumstances, including (*a*) profits of fixed capital, and (*b*) whether before dividing profits previous losses must be made good.

The general rule how profits should be ascertained is well expressed in the words of Sir George Jessel M. R. in *Davison* v. *Gillies*[2]:

'Then I have to consider the question, what are net profits? A tramway company lays down a new tramway. Of course the ordinary wear and tear of the rails and sleepers and so on causes a sum of money to be required from year to year in repairs. It may or may not be desirable to do the repairs all at once; but if at the end of the first year the line of tramway is in so good a state of repair that it requires nothing to be laid out on it for repairs in

[1] [1901] A. C. 477, 487; 70 L. J. Ch. 753. [2] L. R. 16 Ch. Div. 347 *n*.

that year, still before you can ascertain the net profits a sum of money ought to be set aside as representing the amount in which the wear and tear of the line has, I may say, so far depreciated it in value as that that sum will be required for the next year or next two years.

'Take the case of a warehouse. Suppose a warehouse keeper having a new warehouse should find at the end of the year that he had no occasion to expend money in repairs, but thought that by reason of the usual wear and tear of the warehouse it was £1,000 worse than it was at the beginning of the year, he would set aside £1,000 for a repair, or renewal, or depreciation fund before he estimated any profits, because although that sum is not required to be paid in that year, it is still the sum of money which is lost, so to say, out of capital and which must be replaced. I should think no commercial man would doubt that this is the right course, that he must not calculate net profits until he has provided for all the ordinary repairs and wear and tear occasioned by his business. In many businesses there is a regular sum or proportion of some kind set aside for this purpose. Shipowners, I believe, generally reckon so much a year for depreciation of a ship as it gets older. Experience tells them how much they ought to set aside, and whether the ship is repaired in one year or another makes no difference in estimating the profits, because they know a certain sum must be set aside each year to meet the extra repairs of the ship as it becomes older. There are very many other businesses in which the same thing is done.'

Further, the writer would with deference submit that the general rule is, roughly speaking, this: that the balance of assets over liabilities, including the deduction of capital standing at the commencement of the account (whether original capital, or capital which has been properly written off), represents profits (*Verner* v. *Gen. & Com. Trust Lim.*[1]); or, as Lord Lindley pithily says, 'Profits is what a man puts into a concern and what he gets out of it. If I put £100 into a concern and I get £105 out of it, I get £5 profit' (*Re Armitage*[2]).

What sums should be charged to capital and what to profits must depend on the particular circumstances of each case. On this point Lord Lindley has said:

'But excluding cases in which every one can see that a particular debt or outlay cannot be reasonably charged to capital, it may be safely said that what losses can be properly charged to capital and what to income is a matter for business men to determine, and is often a matter on which opinions of honest and competent men differ. There is no hard and fast legal rule on the subject' (*In re National Bank of Wales Lim.*[3]).

[1] [1894] 2 Ch. 239. [2] [1893] 3 Ch. 337. [3] [1899] 2 Ch. 670.

So much for the general rule for ascertaining profits, our next topic touches on profits of fixed capital. There is no case exactly on the point, to the writer's knowledge, where fixed capital only was concerned; but the exceptional circumstances in a case decided by the late Lord Justice Chitty will illustrate the matter. In *Lubbock* v. *British Bank of South America*[1] an English bank sold the goodwill and other assets of its business in Brazil for a sum which realized, after reckoning the paid up capital of the bank and other proper deductions, a net balance of £205,000. The question was whether the bank could divide this as profit, and it was held that it could legally do so.

Let us take an analogous illustration, say the sale of the freehold premises in which a firm carries on its business for a sum twice as large as their estimated value in the partnership accounts. It may be startling to be told that after the firm's capital has been deducted this large accretion from the sale of their premises is profit and not capital; yet it must be so. But it by no means follows that the firm will divide it as profit: it may have been advisable to do so in the bank case, to avoid decrease of profits through the burden of unnecessary capital, and its articles did not prevent it[2]; but the important point is that in these cases the balance is strictly profits and not capital.

The next question with regard to the ascertainment of profits is the difficult one, Whether previous losses on capital account must be made good before any further division of profits can be made?

We will take the case of an ordinary partnership first. In *Upton* v. *Brown*[3] it was held by Mr. Justice Pearson that losses of capital of the testator's business incurred during the lifetime of the first tenant for life must be made good out of profits obtained during the next life-tenancy.

It is unjust that the life owner should receive no income if a portion of the capital should be lost through some unexpected cause, but the business notwithstanding be producing very large profits.

Surely the fair rule should be to spread the loss over a period as stated by Lindley M.R. in *Re National Bank of Wales*[4]:

'Suppose a heavy unexpected loss is sustained ... There is no law which in the case supposed prevents the payment of all future dividends until all the capital so expended is made good. Many honest and prudent men of business would replace a large loss of capital *by degrees*, and would reduce the dividends, but not stop them entirely, until the whole loss was made good.'

[1] [1892] 2 Ch. 198.
[2] Buckley on Companies (1897), p. 558.
[3] 12 Ch. D. 872.
[4] [1899] 2 Ch. at p. 669.

The question whether lost capital of joint stock companies must be first made good before subsequent profits can be divided may become very difficult, being mixed up with the rule of law that there must be no return of capital to shareholders of a company whilst carrying on business (see Lord Lindley's judgment in *Lee* v. *Neuchatel Asphalte Co.*[1], and Buckley, pp. 554-6; Palmer, part 1, p. 521). In the present state of the law on this point it is almost impossible to give any clear rule, and the safer way seems to be to follow Lord Macnaghten's advice in *Dovey* v. *Cory*[2], where the question under discussion arose:

'I do not think it desirable for any tribunal to do that which Parliament has abstained from doing, that is, to formulate precise rules for the guidance or embarrassment of business men in the conduct of business affairs. There never has been, and I think there never will be, much difficulty in dealing with any particular case on its own facts and circumstances, and, speaking for myself, I rather doubt the wisdom of attempting to do more.'

The question therefore as regards joint stock companies appears to be whether in the particular circumstances there has been in point of fact a return of capital as to which opinions will vary, but it would be a very strong measure for the Court to override the directors in such matters (Mr. Justice Farwell in *Bond* v. *Barrow Haematite Steel Co.*[3]). It may be a clear case of returning capital as in *Re The Oxford Building Soc.*[4], where repayments by borrowers by instalments which included principal moneys (according to the usual building society mortgages) were treated as profits of the society. So most lawyers would assent to Mr. Justice Farwell's statement in *Bond* v. *Barrow Haematite Steel Co.*[3]:

'I cannot think it would be right for the defendant company to purchase out of capital the last two or three years of a valuable patent and distribute whole receipts in respect thereof as profits without replacing the capital expended in the purchase.'

On the other hand, the question may be one of nicety. If a company in its accounts sets the full value on a lease belonging to it as part of its assets and then turns the products of that quarry into cash and pays them away in dividends without any replacement of capital, that would appear to be a *return of capital*, unless allowing for the value of the quarried material the company has *sufficient assets to meet its liabilities*. It is apprehended that this is the foundation of the decision in *Lee* v. *Neuchatel Asphalte Co.*[1], and see Mr. Justice Farwell's observations in *Bond* v. *Barrow Haematite Steel Co.*[3]

[1] 41 Ch. D. 1. [2] [1901] A. C. 477. [3] [1902] 1 Ch. 353. [4] 35 Ch. D. 502.

By whom Capitalization can be effected.

The persons effecting capitalization may as partners be themselves the absolute owners concerned, or they may be persons not absolutely entitled, but persons whose determination to capitalize (having power to do so) affects the rights of others concerned.

In the case of *partners* the rule was thus expressed by Lord Bramwell in *Bouch* v. *Sproule*[1]:

'Undivided profits . . . continue to be undivided profits unless something in the articles of partnership or some agreement by all the partners makes them capital. They do not become capital by effluxion of time or by their being used in the trading.'

As regards *companies* the rule to be followed in ascertaining whether profits are to go as income to the tenant for life, or whether profits have been capitalized in the interest of the remainder-man, was formulated by Lord Justice Fry, and has been adopted by the House of Lords in the following terms:

'When a testator or settlor directs or permits the subject of his disposition to remain, as shares or stock in a company which has the power of distributing profits as dividends, or of converting them into capital, and the company validly exercises this power, such exercise of power is binding on all persons interested under the testator or settlor in the share, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholders as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital' (*Bouch* v. *Sproule*[1]).

What the company therefore says is, income goes as income, and what it says is, capital goes as capital, with the limitation pointed out in the judgment referred to, that the company must have power to increase its capital and to appropriate its profits to such increase.

What amounts to an intention to capitalize.

The rule to be observed in regard to this subject was clearly stated by Lord Lindley (then L.J.) in *Re Bridgewater Navigation Co.*[2]:

'When capital and profits belong to the same persons and in the same proportions it becomes unimportant to distinguish the one from the other, and capitalization for convenience may be inferred from slight evidence. But when capital and profits belong to different persons, or to the same persons in different proportions, the effect of capitalizing profits is to change their ownership, and an intention to do this must be shown before conversion of profits into

[1] 12 App. Cas. 397. [2] [1891] 2 Ch. p. 327.

capital can be properly inferred. Moreover, this is a matter on which a majority cannot bind a minority unless expressly empowered to do so.'

The principle in the leading case of *Bouch* v. *Sproule* as to what amounts to an intention on the part of the company to capitalize has been applied in several reported decisions, and different judges have drawn different inferences from the same facts. Space prevents further comment, yet some reference on this subject may be made to the important judgments in *Re The Bridgewater Navigation Co.*[1]

In that case the company being a very prosperous one had written off their plant in the usual way before ascertaining profits, but in addition had deducted considerable sums (which the shareholders would otherwise have received as profits) in providing reserve funds for certain specified purposes.

Lord Justice Lindley dealt with the matter in this way[2]:

'It remains however to be considered whether these undrawn profits have been capitalized . . . Carrying undrawn profits to a suspense account or to a reserve account does not necessarily change their character, still less their ownership; they remain the undrawn profits of those persons to whom they belonged, dedicated no doubt to certain purposes and applicable to those purposes, but not otherwise altered in their character or ownership.'

In conclusion it may be observed that considering the great wealth embarked in the commerce of this country it is rather surprising that the law relating to the distinguishing of capital from income is not more extensive.

There are several points which it would be well for the House of Lords to review, but what settled principles do exist are largely due to the Equity bench, especially to the broad, keen, clear, and sound judgments which are characteristic of Lord Lindley.

W. STRACHAN.

[1] [1891] 2 Ch. 317.

[2] Ibid. at p. 327.

ON THE HISTORY OF PATENT LAW IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES.

IN previous communications we have been content for the most part to accumulate data illustrative of the origin of the English patent system in the sixteenth century. In the present paper we shall commence by stating what appears to be the correct historical interpretation of the sixth section of the Statute of Monopolies, and then proceed to account for the divergent trend of patent law in the latter half of the eighteenth century. First, was the Statute of Monopolies 'simply declaratory of the common law' (Webster, p. 29), or were the 'conditions of validity under the statute and at common law different'? (Ibid. p. 33).

At first sight there would appear to be disconformity on the following points: the common law recognized two parties as the proper recipients of the royal favour, viz. the 'bringer in' or institutor and the discoverer or inventor—a marked preference being assigned to the former: but the statute restricts future grants to the true and first inventor.

Again, the common law decisions prior to 1623 suggest that to qualify for a patent the applicant must have taken certain steps toward introducing the industry; but the statute is silent upon this point. Such qualification was of course constantly alleged by the applicant as the groundwork of his petition. Is there then disconformity on this point between the statute and the law of which it is professedly declaratory? To answer this question we must first apply to the statute the well-known axiom of construction that a document must be interpreted by the light of the contemporary meaning of its phraseology. Turning to the recent issue of the great Oxford Dictionary we learn that the verb 'to invent' and its derivatives possessed, in addition to their modern connotation, two distinct meanings now archaic or obsolete. Invention in the sense of 'discovery' is now obsolete except in phrases relating to the invention of the cross, i. e. the reputed finding of the cross by Helena, mother of the Emperor Constantine. The words also possessed a meaning which, in the case of the verb 'to invent,' is defined as 'to originate, to bring into use formally or by authority, to found, establish, institute or appoint.' This rendering establishes

complete conformity between the statute and common law both as to the legal definition of the grantee and the expressed consideration of the patent grant. In the *Clothworkers of Ipswich* case the phrase 'invention and a new trade' is actually used to distinguish an imported manufacture from 'invention,' i.e. the result of the exercise of the inventive faculty: 'If a man hath brought in a new invention and a new trade . . . in peril of his life or consumption of his estate, *or* if a man hath made a new discovery of anything, in such cases,' &c. Again, 'Of a new invention [i.e. in respect of a new institution] the king can grant a patent,' but 'where there is no invention the king cannot by his patent hinder any trade.' We may conclude, therefore, that the proper interpretation of 'the true and first inventor' of the statute in 1623 was the true and first founder or institutor of a manufacture. Invention, i.e. the exercise of the inventive faculty, was not an essential qualification—institution of the manufacture, from whatever source derived, was the valid consideration of the patent grant under the statute.

Secondly, as to the statutory definition of novelty. Here the statute, which confines future grants 'to the sole working and making of new manufactures . . . which others at the time of making such letters patent and grant shall not use,' is explained by the clause in the letters patent which avoids the grant on proof that the said invention 'is not a new manufacture as to the public use and exercise thereof.' Modern commentators, however, jump to the conclusion that therefore 'there must be novelty.' But manifestly a proper deduction from the clause is that want of novelty could not be raised as a separate issue apart from prior user. Neither in *Bircot's* case or in Coke's commentary do we find any trace of the doctrine that proof of prior publication would avoid a patent. On the other hand the history of Sturtevant's patent (L. Q. R., xiii, p. 315) shows that disclosure *per se* was regarded as insufficient to support a patent. On this point, however, of the statutory limitation of novelty, evidence confirmatory of the above view will be found in the following narrative.

In or about the year 1661 one Yarranton, who had acquired the art of making tin plates and was desirous of introducing the industry, found himself blocked by an obstructive patent from which, as it does not appear in the official blue books, we make the following extract:—

Patent Roll, 13 Car. 2. 'Whereas we have been informed by the humble petition of . . . William Chamberlaine and Dud Dudley Esquires that by their industry and study with much charge and expences they have attained to the perfection of plateing of

steele, iron, brasse and copper and of the tynning of the same plates being their own invention and never before done or used in these our kingdomes or any the dominions or territories thereof, and whereas the said William Chamberlaine and Dud Dudley have humbly besought us *for their better encouragement to exercise and put in practise the said invention*, that we would be graciously pleased to grant them our letters patent of privilege for the sole use and benefit thereof for the time and term of fourteen years according to the statute in that case made and provided Now know ye,' &c.

The patent is voidable in case 'the plateing of steel, &c., is not a new invention of the petitioners as to the public use and exercise thereof within the realm,' &c. No steps were taken to prosecute the grant with effect, but in 1673 Wm. Chamberlaine obtained a reissue of the patent. Upon this later grant Yarranton makes the following comments:

'By way of digression,' he proceeds, 'I make these queries upon patents, because I know they commonly drive trade out of the kingdom.

'Whether this patent for making tinn plates is in force, the *patentee having made none since the granting thereof*? And whether this patent be in force if renewed since tinn plates were made by others?

'Whether patents (for making any sorts of glass) be not void, because glass was made before; and it is but improvement of art? Patents are by the statute for new inventions, that is all new.'

He then proceeds to cite other cases of mere improvement for which patents of doubtful validity had been obtained. He continues—

'And so I may make queryes of most patents . . . because the statute that gives the king power to grant patents for fourteen years limited it wholly to a new invention; for it must not be putting a new piece unto an old cap that must serve turn . . . , but the question with us will be whether it be new, and all and every part of the invention new in this nation? and if so, questionless it is within the meaning of the statute.'

Yarranton's disquisition on the principles of patent law at the Restoration are, of course, in the main an expansion of Coke's Commentary. His interpretation of 'new manufactures' is identical with that of Lord Coke, viz. that the privilege must be 'substantially and newly invented.' 'Novelty,' therefore, according to these authorities is thus limited under the statute: the field of comparison is limited to the existing practice of the art within the realm; but within this limited area absolute distinction may be required to be shown (*Bircot's* case, Coke, Inst. iii. 184).

Yarranton's commentary also serves to explain the obscurity introduced into patent law by the narrowing of the connotation of the term 'inventor.' Without accepting his version of the motives actuating Dud Dudley and his partner it is clear that obstructive patents could now be obtained by (and extended to) parties interested in opposing the introduction of an industry. The expressed obligation to institute the manufacture, of which Yarranton is vaguely conscious, had disappeared from the contract (unless voluntarily reintroduced by the applicant); and the theory of disclosure had not as yet taken its place. How the latter principle found its way into patent jurisprudence, firstly by the insertion by the applicant of a fuller technical description of the invention in the petition (subsequently copied into the recitals of the patent); secondly, by his proposals to file a specification within a stated term after the issue of the letters patent, and finally in the occasional insertion by the law officers of a clause making this condition obligatory, has been discussed already (L. Q. R., July, 1897). Compulsory disclosure can be traced back as far as A.D. 1716, but the uniform insistence upon the acceptance of this condition did not become part and parcel of patent practice until a much later date, viz. circa 1740. Let us now see how the construction of this clause in the letters patent reacted upon the theory of patent law in the latter half of the eighteenth century. *Dollond's* case in 1766 established that proof of priority of invention without publication will not invalidate a later patent to an inventor who has disclosed the invention, although the first inventor be a native of the realm. This ruling case sharply distinguishes the English patent system from that of America, which supports the true and first inventor's rights against all comers. The decision embodies the first intimation of the doctrine that disclosure by the patentee is the real consideration of the patent grant. In 1776 the authority of Coke was rudely shaken by the reversal in *Morris* v. *Branson* of the law laid down in *Bircot's* case respecting the validity of patents of addition.

In 1778 we reach the case of *Liardet* v. *Johnson*, with which we shall deal somewhat fully. The facts relating to this trial are set out in the following report, which we reproduce from the *Morning Post* of Feb. 23, 1778 (No. 1667, p. 2, col. 4).

Law Intelligence. King's Bench.

'On Saturday was tried, before Earl Mansfield and a special jury, a remarkable cause, in which Mr. John Liardet, clerk, and Messrs. Adam, of the Adelphi, were plaintiffs, and Mr. John Johnson, of Berner's Street, defendant. The action was brought by the plain-

tiffs for an infringement of a patent, and Act of Parliament, granted to them for a term of years, for the new invented stucco, or composition, to imitate stone, for covering the outside of buildings. Johnson (the defendant) had taken out a patent for a composition imitating that of the plaintiffs and his having executed several works in consequence thereof was the cause of bringing this action. He did not, however, attempt to support his patent before the court, but rested his defence solely upon this question, Whether the plaintiffs' composition was a new and useful invention, and whether their patent and specification were sufficient to support the exclusive privilege which they claimed?

'Dictionaries of arts and sciences and books of all languages were ransacked to prove receipts for compositions similar to the plaintiffs'; some ineffectual verbal evidence was also adduced to prove that different attempts had been made to discover a similar composition prior to Liardet's; but some of the most eminent and experienced architects, plaisterers, and builders gave the most ample testimony of the novelty and utility of the plaintiffs' invention, and that till it came in use they knew no stucco that would, in this climate, stand on outside work exposed to the weather. The legality and justness of the patent and specification being also proved to the satisfaction of the jury, a verdict, with costs, was given for the plaintiffs, by which the validity of the patent is fully established, the benefit of this useful and beautiful invention confirmed to the proprietors, and the publick secured from any attempts to impose a spurious imitation of it upon them in future.'

This decision led to a brief paper warfare, which has preserved to us not only the substance of the speeches by counsel engaged in the trial, but also a verbatim report of Lord Mansfield's address to the jury, which is here reproduced in abstract from pamphlet (*c*) scheduled below[1].

'Gentlemen, this is an action which comes out of the Court of Chancery, when a bill was first filed by the plaintiff[s] here for a violation done to them by the defendant, in making use of an

[1] For the purposes of reference the following account of the literature of the trial will be useful.

(*a*) An appeal to the public on the right of using oil cement. 1778. 8vo, pp. 79. May be seen at the British Museum or Patent Office Libraries. It contains a list of anticipations relied upon by the defendant, with a general statement of the law as to novelty and sufficiency of description. It was favourably reviewed in the Monthly Review, vol. lx, where brief notices of the following pamphlets will also be found.

(*b*) Observations on two trials at law, &c. A somewhat scurrilous pamphlet. British Museum Library.

(*c*) A reply to Observations on two trials at law, respecting Messrs. Adams' new invented stucco, containing Mr. Wallace's reply to Mr. Dunning, with the summary of the evidence and the charge to the jury as taken down in court. London, [1778]. 8vo. Of this pamphlet only one perfect copy is known to the writer, viz. in the Bodleian Library. A MS. copy of the summing up of Lord Mansfield has been placed in the Patent Office Library (No. 28165). The Museum copy is defective, wanting nearly the whole of the judicial summing up.

invention to which they are entitled by letters patent, confirmed by Act of Parliament. And to be sure, there are two extremes in such trials always to be avoided. The one is not to deprive the inventor of the benefit of his invention for the sake of the public; because the public is concerned that men should have such an advantage, as they get by their endeavours many new discoveries in looking for things which never succeed. So in the play of the Alchymist, when Sir Epicure Mammon was looking for the philosopher's stone he found out a cure for the itch. Thus, if they don't get what they are looking after, they find something else, and some of the greatest inventions we know of have been hit upon by accident. And whenever an invention consists of a composition, people are led by theory to make experiment: but it must depend upon the experiments; and therefore one extreme is to defeat the intention of the law, which is to give the benefit to such discoverers. The other extreme is, the suffering men to get monopolies of what is in use and in the trade, at the time they apply for the letters patent; and therefore the statute of King James expressly qualifies it. That it must be of such inventions as are not then used by others; and that is the proper construction, which you will consider of in the course of my summing up the heads of this case.

Now there are three grounds that must be made out to your satisfaction:

'The first is (I think in order of method, though they have not made it the first at the bar) that the defendant did use that which the plaintiff claims to be his invention. If he did use it, the next point is (because it is his justification for using it) whether the invention was new or old, within the sense of the Act of Parliament.

'The third point is whether the specification is such as instructs others to make it. For the condition of giving encouragement is this: that you must specify upon record your invention in such a way as shall teach an artist, when your term is out, to make it—and to make it as well as you by your directions: for then at the end of the term, the public have the benefit of it. The inventor has the benefit during the term, and the public have the benefit after. But if, as Dr. James did with his powders, the specification of the composition gives no proportions, there is an end of his patent, and when he is dead, nobody is a bit the wiser; the materials were all old—antimony[1] is old, and all the other ingredients. If no proportion is specified, you are not, I say, a bit the wiser; and, therefore, I have determined, in several cases here, the specification must state, where there is a composition, the proportions; so that any other artist may be able to make it, and it must be a lesson and direction to him by which to make it. If the invention be of another sort, to be done by mechanism, they must describe it in a way that an artist must be able to do it[2].'

[1] An ingredient in Dr. James's fever powder. A sum of money was subsequently voted by Parliament to the inventor.

[2] This portion of Lord Mansfield's summing up must be regarded as an *obiter dictum*, as the sufficiency of the plaintiff's amended specification does not appear to have been challenged by the defendant.

After describing the invention, and calling attention to the evidence showing infringement, the judge continues:—

'The next consideration is whe[ther] this is a new invention within the meaning of the Act or an old one and at that time in use in the trade.'

The learned judge then proceeds to point out that the defendant in a patent taken out subsequently to that of Liardet had sworn that his own composition was a new invention, notwithstanding the evidence of anticipations of both patents now produced in his behalf. 'No evidence can be stronger against him than this.' The law of prior user is then stated as follows:—

'Now with regard to the invention being in use, as I told some gentlemen upon the jury two or three days ago, it must be taken in this latitude. It is not a man's having made an attempt; it is not a man's having suggested an idea; it is not a man's having it in a closet; it is not a man's hitting upon it by accident and not pursuing it farther, knowing he has hit upon a good composition, but it must be something in the trade that is followed and pursued. It is not an invention that a man may have made use of in an instance or two, and dropped it, and never claimed it after, that will prevent another inventor (without any privity of knowledge of those materials) if he really hits upon those materials and makes a composition of service to artists.'

Then as to prior publication.

'Here is a great deal of evidence material upon both sides of its being old, in the sense the defendant contends for, and not in the sense the plaintiff contends for. First there is written evidence to show that it is old, and there are dictionaries, first Alberti's book, and then a dictionary of 1726, followed by four more dictionaries to 1764.'

Prior anticipation in specifications and the evidence of witnesses and of experiments on both sides is next dealt with. He then proceeds to state the law as to utility[1].

'It is not material to try the exact excellence of a composition; if the composition is good for nothing the plaintiff gets nothing, and nobody gains by it. Is it a new invention? Is it new? For if it is new and good for nothing, nobody will make use of it. The great point is, is it a new thing in the trade, or was it used before and known by them? Now to contradict this and to show the trade did not know the process of it, and had not used it, and that those who had read of it, and heard of it, did not know it and could not venture upon it with certainty: you have a great number of architects upon the plaintiff's side, and plaisterers. . . . And it is

[1] 'We cannot subscribe to this great authority when he represents the merit of the invention as of little consequence, because it is obvious that patents for ineffectual or imperfect discoveries are the means of preventing better things. . . .' Extract from 'Monthly Review,' vol. 60.

material . . . that in all patents for new inventions, if not really new discoveries, the trade must be against them; for if it is an old thing it is a prejudice to every man in the trade; it is a monopoly.' 'Then if it is fairly an invention, that it was not in the knowledge of the trade at the time the letters patent were granted. The next consideration is whether the specification teaches you to make it again.' On this point no rebutting evidence was adduced.

Concluding remarks.

'You have the whole of the case before you. . . . You will settle in your minds whether the defendant has used the composition, whether it is old or new: in the next place whether it is such a one as was in use in the trade at the time of the letters patent; or really and fairly a new invention, which they had not. Whether it was in books or receipts, it never prevailed in practice or in the trade. And the last thing is whether the specification don't teach any other artist to make use of it.' Verdict for the plaintiff.

The interest of this trial centres broadly upon the judicial interpretation of 'novelty' under the statute and in the letters patent. According to Lord Mansfield, the issue of want of novelty must be supported either by proof of continuous and successful prior user of the invention, or, that the substance of the invention was common knowledge in *the trade*. Unquestionably this ruling embodies the correct interpretation of the statutory limitation of novelty, but its applicability in the eighteenth century was negatived by its failure to realize the entire change introduced into the conditions of the contract between the Crown and patentee by the interpretation first placed by Lord Mansfield upon the function of the specification. With the shifting of the 'consideration' of the patent grant from practice to disclosure a corresponding alteration in the legal limitation of novelty became necessary.

This view we find emphasized, although without success, by Mr. Dunning, the defendant's counsel. The grant, according to his statement of the law, is limited by a proviso (a misquotation by the way of the clause in the letters patent)

'That that which was known to the public before the date of the letters patent shall be open to all. By being known to the public is and must be understood anything which has been conveyed in a public manner, such as by a general publication in print or by public use.'

If space had permitted we should have been glad to reproduce a fuller account of Mr. Dunning's argument, which contains references to decisions not to be found elsewhere. It is noteworthy that the defendant's pamphlet was utilized by Buller (Nisi Prius, 2nd ed.) and Carpmael's Patent Cases, while that of the plaintiffs was

unknown even to Bramah, who would scarcely have submitted to the Court his own version of this trial, if he could have referred to the verbatim report contained in the plaintiffs' publication.

We conclude that the existing law of prior publication is based not upon the statute, but upon general considerations of the nature of the contract between the Crown and the patentee, as modified by the new clause in the letters patent. If the substance of an invention has been conveyed to the public in any form or shape, a subsequent disclosure of the same invention by a later inventor cannot form the basis of a valid monopoly. The contract will lack consideration, and will therefore be null and void.

E. WYNDHAM HULME.

INSURANCES OF ENEMIES' PROPERTY.

THE rules governing the legality of insurances against losses happening during time of war, were principally settled in Great Britain about a century ago, in a series of cases which arose during the French Revolutionary and Napoleonic wars. My object is to endeavour to ascertain whether any modification of these rules has since occurred, and whether any questions then left unsolved have since found their solution.

On the continent of Europe the insurance of enemies' goods at sea against capture by the insurer's own state was, generally speaking, illegal from early times; on the ground that the destruction of the enemy's commerce was one of the aims of the insurer's government; and that to insure an enemy's ship or cargo against such capture constituted really an encouragement of his commerce.

This was so certainly in Spain and France, probably in Germany, the Netherlands, and Italy. It is said that there was a special exception in Germany in favour of the Hanse towns. But it may be stated broadly that, by the time of the outbreak of the French Revolutionary wars, it was the general, if not the universal rule, that insurances of enemies' property at sea were illegal and void [1].

In England the case was otherwise. In order to understand the course of judicial decisions in England, it is necessary to bear in mind that two distinct questions may arise, according as the insurance was effected before or after the outbreak of war. Down to the year 1800 it had never been decided in England that it was illegal to insure property engaged in a trade between an enemy country and Great Britain.

Insurances were, indeed, not uncommonly made by British subjects upon the property of those who were, at the time, subjects of an enemy state, and which property was engaged in a trade, which it was the object of the British Government to prevent.

In the year 1800 it was decided in the case of *Potts* v. *Bell* [2] that, as all trade with the enemy was illegal (according to the decision in 'The Hoop [3]'), it was also illegal to encourage such trade by insuring the property engaged in it. It must be borne in mind

[1] See Duer on Maritime Insurance, vol. I, lecture iv, notes 1 and 2 (1845).
[2] 8 T. R. 548, 5 R. R. 452.
[3] 1 C. Rob. 196.

that, in this case, the illegality of the insurance resulted from its being an encouragement to a trade with the enemy, which it was the direct object of the British Government to put a stop to. It would follow from the same principle that any contract of insurance with an enemy made during the war would be illegal and void.

Two years later, in 1802, the question as to the operation of an insurance made before the outbreak of war, in the event of a capture by a British ship, or the ship of an ally, during the war, was dealt with in the case of *Furtado* v. *Rogers*[1]. The effect of this case was that any contract of insurance, whenever made, so far as it insured the property of an enemy against a loss which it was the object of the British Government to inflict upon him, was void. The particular case was the case of an insurance on a ship; which covered, amongst other things, the risk of capture by British ships, in the event of war between Great Britain and the country of the assured. The decision of the Court was—that the policy must be read as containing an exception of this risk. In 1803 the same principle was affirmed in the cases of *Kellner* v. *Le Mesurier*[2] and *Gamba* v. *Le Mesurier*[3].

In the same year was decided the case of *Brandon* v. *Curling*[4], which requires some examination.

This was a case in which goods, the property of one who became an enemy of Great Britain after the effecting of the insurance, were seized by the Government of Spain as prize. No reliance was placed on the fact that Spain was the ally of England, but the loss of the goods was treated as a loss by misadventure. As the goods were in course of carriage by sea, and formed part of the commerce of the enemy, which it was the object of the British Government to destroy, an insurance by a British subject of these goods would operate to defeat the object of the British Government, even although the loss were due to any ordinary accident. The important thing to bear in mind is this, that the aim of the British Government was to drive the enemy's commerce off the seas, and not merely to effect the seizure of certain valuable property of the enemy.

If it is borne in mind that these goods were being carried on the high seas, and formed part of that commerce of the enemy which the British Government was seeking to destroy, the proviso which Lord Ellenborough, in giving judgment, stated should be ingrafted in all policies, viz. 'Provided that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the insurer,' would seem to be in accordance with principle. But it was not

[1] 3 B. & P. 191, 6 R. R. 752.
[2] 4 East 396, 7 R. R. 581.
[3] 4 East 407, 7 R. R. 590.
[4] 4 East 410, 7 R. R. 592.

necessary to decide, and one would suppose that it was not present to Lord Ellenborough's mind, to consider what the effect of the outbreak of war would be upon an insurance made before the war against, say, the accidental burning of an enemy's house during the war. It is submitted that the proviso should only be ingrafted in policies insuring property which it is the object of the Government of Great Britain to seize or destroy. These principles, then, seem to have been established a century ago, and to have remained unquestioned ever since:—

(1) That any insurance of property which would tend to act as an encouragement of a commerce which it is the object of the British Government to damage or destroy, is, to just that extent, illegal and void.

(2) That any contract of insurance whatever, effected during a war between the country of the insurer and that of the assured, is wholly illegal and void, as constituting a trading with the enemy.

To these may be added the rule of procedure: That an alien enemy cannot sue at all, during the continuance of the war, in the courts of the country with which his own country is at war. See *ex parte Boussmaker*[1].

If we apply these principles to insurances of enemies' property against losses which occur during war between the countries of the insurer and the assured, they are found to cover all cases, except that of an insurance of property on land effected before the outbreak of war and sued on after the making of peace. It is right, however, to mention that, in one case of enemy's property at sea, there may be a valid insurance by a British subject, that is to say, in the case of the subject of an enemy state who has received a licence to trade from the Crown. This was decided in the case of *Flindt* v. *Scott*[2].

As both the effecting of the insurance and the loss and the commencement of the action took place during the existence of the war, the real basis of the decision was, and indeed must have been, that the effect of the licence was to do away altogether, for all purposes connected with the voyage in question, with the enemy character of the holder of the licence.

I proceed, then, to consider the case of an insurance, effected before the outbreak of war, on property on land belonging to one who then becomes an enemy, against a loss which occurs during war between the countries of the insurer and the assured. Is it true that such a loss can never be recovered? In the first place it is indisputable that, whether it be within the competence of

[1] 13 Vesey 71, 9 R. R. 142. [2] 5 Taunton 674, 15 R. R. 615.

a state to confiscate debts due from its subjects to enemies at the outbreak of war or not, it is at least certain that, in the absence of such confiscation, the right to recover the debt arises afresh on the conclusion of peace [1].

It would follow that, if in truth the happening of the loss may be correctly regarded as merely a condition upon the happening of which the debt springs into existence, nothing has been done by either party during the war; and the principle which prohibits trading with the enemy cannot apply. If we consider the question upon principle, it is not easy to see exactly on what ground the insurance would be held invalid. In order that it should be invalid, it must be shown to be contrary to some principle of policy of the British Government. Now it is no part of the policy of any civilized government, in time of war, to destroy the private property of alien enemies situated on land, whether in the territory of either belligerent or in that of a neutral power. The only occasions on which it is now generally considered lawful to seize or destroy the private property of enemies situated in the enemy territory are occasions of military necessity [2].

With regard to the property of enemies situated in its own territory, in old times a state was considered entitled to confiscate this if movable, and to seize the income arising from it if immovable [3].

But by long disuse this right has become practically obsolete. Since 1807 there is no instance of its having been exercised in civilized war, except by the Confederate States in the American civil war. As a general statement, then, it is true to say that it is not the object of the British Government to seize or destroy the private property of enemies situated on land; and that in insuring such property against the ordinary risks the insurer is running counter to no object which his own government has in view. After the lapse of a century from the time of the Napoleonic wars, the question as to the legality of the insurance of enemies' property has again acquired importance, owing to the insurances by British subjects of property in the Transvaal effected before the outbreak of war. In the absence of any express decision to the contrary, although there are observations of some of the judges pointing the other way, the true principle would seem to be:—that a loss covered by an insurance effected before the outbreak of war is recoverable

[1] See *Brown* v. *United States*, 1810, 8 Cranch 110, at p. 122; *Wolff* v. *Oxholm*, 1817, 6 M. & S. 92, 28 R. R. 313; *Hanger* v. *Abbott*, 1867, 6 Wallace 532, at p. 536.

[2] See Wheaton's Elements of International Law (3rd English edition, 1889, p. 468); Halleck's International Law (English edition, 1878, by Baker), c. xix, s. 13, p. 457; Calvo, Le droit International (4th edition, 1886), s. 220.

[3] See Vattel, Droit des Gens, book III, c. iv, s. 63, and c. v.

after the war is over, although it be in respect of property belonging to an enemy, unless it was the object of the British Government to capture or destroy property of that kind; or unless some other object of the British Government would be defeated by the insurance being allowed to be valid. If this principle be accepted, it remains for me to inquire whether such an insurance, although not necessarily void, may be invalidated by some and what incidental circumstances; and in making this inquiry I will consider also whether these circumstances might not invalidate the insurance, even although the countries of the insurer and the assured were not actually at war.

The ground upon which the invalidity of insurances of this kind must always be based, is that they are injurious to the state to which the insurer belongs, because they tend to defeat some object at which his government is aiming. Now it would seem to follow from the proposition that it is not the aim of the British Government to destroy the property of enemies situated on land; that to indemnify an enemy against the accidental destruction of such property would not conflict with any object at which the British Government is aiming; and that such an insurance is only invalid if it would indemnify the enemy against a loss which the British Government intended him to undergo.

Now in time of war the private property of enemies is liable to be confiscated by way of penalty for military offences. As, in this case, the loss is one which the British Government inflicts deliberately, it would follow that any insurance by an English subject against such a loss would be void. Another instance of the seizure of enemies' property on land is when forced contributions are raised for the support of an invading army. As the object of these contributions is the support of the army, and not the deprivation of individuals of their property, it would rather seem that an insurance against loss in this way would be unobjectionable. Again, property of the enemy found on the field of battle or taken in storming a fortress may be seized. It would be beyond the scope of this article to analyse the exact grounds upon which the seizing of this property is to be justified; but it would seem to be exceedingly doubtful whether an insurance against such a seizure would be allowed to be good.

In one case, which arose in the course of the American civil war, it was rather broadly said that any property with which the enemy could purchase munitions of war, and thereby be enabled to continue the struggle, was liable to seizure[1].

Whether this proposition is in accordance with international law

[1] See the case of Mrs. Alexander's cotton, 2 Wallace, 405.

at the present day or no, I suppose it to be true that it would be illegal for a British subject to insure an enemy against such a loss if the British Government should designedly inflict it upon him. It has so happened that, in the course of the war in South Africa, the cases of disputed insurances which have arisen have been in consequence of losses due to seizures by the Transvaal Government, and not by the Government of Great Britain, with the result that the questions debated have been as to the legality of insurances of property against seizure by the government of the enemy.

Two distinct questions have arisen:

1. As to the legality of an insurance by a British subject of the property of a subject of the Transvaal against the risk of seizure by the Transvaal Government.

2. As to the legality of an insurance by a British subject of the property of another British subject, situated in the territory of the Transvaal, against the risk of seizure by the Transvaal Government.

1. The first of these questions was discussed in the case of *Driefontein Consolidated Mines* v. *Janson*[1]. The plaintiff company was registered under the laws of the South African Republic; and the loss on which it claimed to be paid was due to a seizure of gold belonging to the Company, by the Government of the South African Republic, some eight days before the outbreak of war. At the time of the seizure there was great friction between the Government of the South African Republic and the Government of Great Britain, and it was alleged that the seizure was made for the purpose of securing funds to prosecute war against Great Britain.

In reality two questions of principle were involved:—

(*a*) Whether an insurance by a British subject, effected in time of peace against a loss which might result from the raising of funds by the Government of a country at war with Great Britain, and for the purposes of the war, from its own subjects, is valid.

The fiction, that the subject of any state cannot found a claim to indemnity on the acts of his own government, because he is considered to be identified with his own government, propounded in *Conway* v. *Gray*[2] has been overruled in *Aubert* v. *Gray*[3]. But, unless the war is actually carried on in the territory of a state, its civilian inhabitants, under the conditions of modern warfare, do not feel the stress of it, except in the additional war taxation or the forced loans and contributions of their own government. It would seem to be in accordance with the principles I have

[1] [1900] 2 Q. B. 339; [1901] 2 K. B. 419.
[2] 10 East, 536. [3] 3 B. & S. 163.

endeavoured to elucidate, that to indemnify an enemy against the stress so put upon him would tend to defeat the object of the British Government, in endeavouring to force the enemy to sue for peace, and would therefore be illegal.

(*b*) Whether such an insurance would equally be illegal, if the loss occurred before the actual outbreak of war, but at a time when it seemed probable that war might ensue?

It has been suggested that, under these circumstances, the case would be analogous to that of a hostile embargo: and the observation of Chief Justice Erle in *Aubert* v. *Gray*[1] has been supposed to lend colour to the view that such an insurance would be illegal.

But it would seem that this supposition arises from a confusion of a hostile embargo with a civil embargo. A hostile embargo is one which is laid upon the ships of those with whose government war is anticipated; and the insurance against a loss from this cause, by a subject of the country imposing the embargo, would be an insurance of enemies' property (by reason of the retroactive effect of war on the property upon which the embargo is laid) against a loss, designedly inflicted by the underwriter's own government.

It would not seem that what was said in *Aubert* v. *Gray* would apply to a loss sustained in consequence of what is known as a civil embargo, imposed by the assured's own government; and which would not, at any rate at the present day, have any connexion with hostilities against another country.

As it is understood that this question is awaiting decision in the House of Lords, it is sufficient to indicate the question to be decided; and the principles which it is presumed will govern the decision; without endeavouring to anticipate what the decision is likely to be: the test being whether the loss is one which, in the interests of British policy, it is desirable that the assured should undergo.

2. The second of these questions was discussed in the case of *Nigel Company* v. *Hoade*[2]. In that case the plaintiff company was registered in the British Colony of Natal, and was treated as being a British subject; the loss was sustained in consequence of a seizure of gold belonging to the plaintiff company, by the Government of the South African Republic, during the war.

Generally speaking, it is not the object of a government to inflict loss upon its own subjects, and therefore there would be nothing illegal in one subject insuring another against such a loss. It is only in cases of persons siding with the enemy, or who have themselves, or whose property has become identified with the

[1] 3 B. & S. at p. 182. [2] [1901] 2 K. B. 840.

enemy, that an insurance against loss from seizure by the enemy government would be illegal. In this case the Nigel Company had acquired a gold mine in the Transvaal, and, up to the time of the outbreak of war, had worked the mine and sent the gold extracted, in one shape or another, to England.

On the outbreak of war the Company ceased to work the mine and ceased to transact business in the Transvaal. The question then which arises is, whether either the Company or the gold which was seized had acquired an enemy character, so as to render an insurance against the risk of seizure by the Transvaal Government illegal. As this question has still to be determined by the Court of Appeal it is enough to have pointed out the principles upon which its decision will rest.

To sum up the results of this inquiry. As far as the private property of enemies on the sea is concerned; this is still, as a century ago, liable to capture as a means of destroying the maritime trade of the enemy. The reasons, therefore, which originally caused insurances of such property to be held invalid still exist: and there is no reason to suppose that there is likely to be any change in this respect, so long as property of this description is liable to capture. Again, the rule prohibiting all trading with the enemy, except by special permission, remains in full force; and this rule, as formerly, operates to prevent a valid insurance being effected of an enemy's property while the war is in progress.

There has been no decision dealing with the effect of an insurance of private property on land, entered into before the outbreak of war, against a loss which may occur during the war. But it is suggested that the general rule exempting private property on land from seizure during war should carry with it, as a general rule, the validity of insurances of such property. And, if this be so, the exact grounds on which any particular insurance of such property ought to be held invalid still await decision.

D. F. Pennant.

IS OUTLAWRY OBSOLETE?

IT was announced in the House of Commons some time since that a warrant for the arrest of Mr. Arthur Lynch, the member for Galway City, on a charge of high treason would be applied for in the event of his being found within the jurisdiction of the Courts of this country. Until that event occurred, and so long as Mr. Lynch remained in foreign parts, it was impossible to secure his arrest. Even if a warrant had been granted here it could only have been made effective in a foreign country under the provisions of an Extradition Treaty, and it is certain that extradition would have been refused in such a case as his—whether rightly or wrongly we are not concerned to discuss—on the ground that the offence was of a political character and therefore within the class of cases invariably excepted from such treaties.

In these circumstances it was suggested that although the arrest of Mr. Lynch could not be effected it might be practicable to take proceedings against him by way of outlawry, and the suggestion has raised a question of some interest. In civil cases outlawry was abolished by Statute in 1879, but it is undoubtedly still in law a valid form of process in all criminal cases. It has not been resorted to in recent years—we believe the last judgment of outlawry in felony was in 1859—and it is described as obsolete by some writers of authority, but this disuse may well be due to the fact that the practice of extradition has now become general and provides a simpler means of bringing fugitives to justice in all but the small class of offences which are regarded as political. Cases of treason have but seldom occurred in this country of late years, and there seems to have been no recent instance in which the possibility of proceeding to outlawry has been considered. The case of Mr. Lynch, however, has called attention to the matter in a practical way, and, although the difficulty in that particular case has been solved by the return of the accused, the general question whether outlawry is still a proper mode of proceeding against a subject accused of treason, whose arrest it is not possible to effect, seems worthy of consideration.

Few lawyers of the present day can have had experience in practice of outlawry, and it may therefore be useful first to briefly

recall the general nature and effect of it. Outlawry is, as will be remembered, one of the oldest weapons of the Common Law: it is known that it formed part of the law of this country before the Norman Conquest, but it was then limited in its operation to charges of capital crime. It was in substance a process by which punishment could be inflicted on criminals who fled from justice: their flight was regarded as an admission of guilt, and they were outlawed in their absence without trial. The effect of a judgment of outlawry was at first to put the outlawed person entirely beyond the protection of the law in every sense: he was said to have *caput lupinum*, in other words to be like a wolf, a hateful beast which it was the duty of every man to exterminate. It was no offence to kill an outlaw: indeed, in the strictest sense of the law, it appears rather to have been the duty of every man to do so. It is interesting from an historical point of view to note in this connexion the suggestion adopted by Sir F. Pollock and Professor Maitland, that this absence of protection 'explains an episode which is otherwise puzzling, namely, the ease with which punishments were charged without ceremonious legislation.' The fate of an outlaw was completely in the king's hands. The outlaw had no right to claim any particular form of punishment, and the king might take life or choose the kind of death: he might be content with a limb, or he might insist on banishment or abjuration of the realm (Hist. of Eng. Law, 2nd ed., ii. 461). In this particular the law was long since modified, and an outlaw can now only be executed in due form. But though the person of the outlaw is protected to this extent he still remains in the position of a convict. A judgment of outlawry is still tantamount to a sentence on conviction, and the outlaw can be executed on it. The practice appears to be to move for an award of execution on the judgment of outlawry (*R.* v. *Armstrong*, 10 St. Tr. 105). 'Outlawry in capital cases,' says Lord Mansfield, 'is as a conviction for a crime, and many who never were tried have been executed upon the outlawry' (*R.* v. *Wilkes*, 4 Burr. 2550). The Act which abolished forfeiture and corruption of blood in other cases is expressly restricted in its operation from judgments of outlawry: those additional consequences therefore still ensue.

Although, as we have said, outlawry was originally confined to capital crimes, it was subsequently extended to other crimes and to civil actions. Coke (Co. Lit. 128 b) says as to this:

'And it is to be observed, that, in the reign of King Ælfred, and untill a good while after the Conquest, no man could have been outlawed but for felonie, the punishment whereof was death. But now the law is changed, and it appeareth by that which hath beene

sayd. And hereby you shall understand old bookes and records which say, that an outlawed man had *caput lupinum*, because he might be put to death by any man, as a wolfe that hateful beast might. "Utlagatus et waiviata capita gerunt lupina, quae ab omnibus impune poterunt amputari; merito enim sine lege perire debent, qui secundum legem vivere recusant [1]." And another saith, "Utlage pur felonie teigne leu pur loup, et est criable woolfesheved, pur ceo que loup est beast haye de touts gents, et de ceo en avant list al ascun de le occider al foer del loup, dont custome soloit estre de porter les testes al chiefe lieu del county, ou de la franchise, et soloit la avoire demy mark del countie pur chescun teste de utlage et de loupe [2]." And this agreeth with the law before the Conquest: "Utlagatus lupinum gerit caput, quod Anglice woolfeshead dicitur; et hæc est lex communis et generalis de omnibus utlagatis [3]." But in the beginning of the raigne of King Edward the third, it was resolved by the judges, for avoyding of inhumanity, and of effusion of Christian blood, that it should not be lawfull for any man, but the sherife onely, (having lawfull warrant therefore) to put to death any man outlawed, though it were for felonie; and if he did, he should undergoe such punishments and paines of death as if he had killed any other man: and so from thenceforth the law continued until this day [4]. (Nota, *woolfeshead* and *wulferfod* [5] is all one.) And after in Bracton's time, and somewhat before, processe of outlawry was ordained to lie in all actions that were *quare vi et armis*, which Bracton calleth *delicta*; for there the King shall have a fine. But since, by divers statutes, processe of outlawry doth lie in account, debt, detinue, annuity, covenant action sur le statute de 5 Rich. 2, action sur le case, and in divers other common or civill actions.'

This subsequent extension does not concern our present purpose, but it is material to remember that in cases of misdemeanour and civil causes the character of outlawry was essentially distinct from that which it bore in treason or felony. In civil causes outlawry was merely a means of compelling appearance to the suit, or, if after judgment, of procuring satisfaction (*R.* v. *Wilkes*, *ubi sup.*). In misdemeanour it was regarded merely as a punishment for contempt of court in not appearing, and the judgment in such cases did not operate as a conviction (*R.* v. *Tippin*, 2 Salk. 494). But in treason and felony the flight of the accused was considered as an admission of guilt, and the judgment of outlawry was enforced to inflict punishment for the crime so confessed;

[1] Fleta, lib. 1, c. 27.

[2] Mir., l. 4, c. 4. [The text is given here as quoted by Coke, except for the correction of one obvious misprint. For a critical text see the Mirror, ed. Whittaker, Seld. Soc. 1893, p. 125. Coke's 'demy mark' seems to be a conjectural correction for the 'decim marks' of the original.—Ed.]

[3] Lamb. fol. 128.

[4] 2 Ass. p. 3, 2 Ed. 3, tit. Coron. 148.

[5] I do not know what this queer form stands for, or whether it is what Coke wrote.—Ed.

'for as to outlawries in treason and felony the law interprets the party's absence a sufficient evidence of his guilt, and without requiring further proof or satisfaction accounts him guilty of the fact, on which ensues corruption of blood and forfeiture of his whole estate, real and personal' (Bac., Abr. 'Outlawry').

The outlaw, then, in effect is condemned in his absence without trial, and unless he can set aside the judgment of outlawry he has, apart from the statutory exception in the case of treason to which we will presently refer, no means of reopening the matter and establishing his innocence before a jury. The only course open to him is to move to set aside the outlawry by writ of error, and to obtain this he must in treason or felony render himself in custody and pray in person allowance of the writ at the bar. If he succeed in setting aside the judgment of outlawry, he is then put to answer the indictment on which the outlawry was founded (Hale, P. C. ii. 209). The stringency of the penalty which ensues on outlawry, and the liability to abuse to which the process is subject, have always inclined the Courts to strain every point in favour of the applicant and to set aside judgments on proof of error either in law or in fact of any kind in order to allow the outlaw the privilege of trial. The abundant technicality of the procedure afforded ample opportunity for the suggestion of error in law; and as in cases where there had been no undue delay in applying for the writ the prosecution were in general willing that the outlaw should be put on his trial and the Court desired it, errors of the most technical kind were commonly treated as sufficient. In the case of *R.* v. *Davis*, 1 Burr. 638, the counsel for the defendant pointed out no less than seven errors in law apparent on the face of the record, and the report concludes with the observation that the Court and counsel were agreed that there were a great many others! The principal ground of error in fact was the allegation that the defendant had been absent from the country at the time of the exigent awarded; but by statute (5 & 6 Ed. VI, c. 11, s. 7) that ground of error was taken away in treason. To compensate however for this deprivation an outlaw was given by the same statute (s. 8) the right to traverse the indictment for treason on which the outlawry had been pronounced if he surrendered himself to the Chief Justice of England within one year after the date of the judgment. The effect of this statute is clearly stated by Sir John Hawles, Solicitor-General in the reign of William III, in a note appended to the report of *Armstrong's* case (10 St. Tr. 123):—

'At common law, if a person was beyond sea when an outlawry was pronounced against him it was an error in fact for

which the outlawry was to be reversed; and it is an error in all outlawries but for high treason to this day. By the 6th Ed. VI, that error is taken away in high treason, but there is a proviso in that statute, that if the person outlawed shall within a year after the outlawry pronounced yield himself to the Chief Justice of the King's Bench and offer to traverse the indictment, and on his trial shall be acquitted, he shall be discharged of the outlawry . . . The reason of making that statute was this: men would commit treason and presently fly beyond sea, and stay there till the witnesses who should prove the treason were dead; then return and reverse the outlawry for the error of their being beyond sea; and the witnesses being dead they were safe: and therefore this statute takes away that error in fact, though not in the whole, and doth in effect say that the person outlawed shall not have advantage of that error unless he comes and takes his trial within a competent time, which that statute limits to a year after the outlawry pronounced.'

Error in fact was abolished by the Judicature Act, 1873, s. 47, but the statute of Ed. VI still remains in force.

In Sir Thomas Armstrong's case the question arose whether an outlaw arrested and brought before the Court in custody on motion for award of execution within the year could claim the benefit of the statute by then offering to render himself to the Chief Justice. Jefferies L.C.J. ruled that the rendering must be voluntary, and Sir T. Armstrong was executed a few days afterwards. This decision finds no support in the terms of the statute, and has been universally condemned. In 1689 the House of Commons resolved that Armstrong's plea ought to have been admitted, and expelled from the House Sir Robert Sawyer, who had conducted the prosecution as Attorney-General. A somewhat severe penalty for taking a false point in argument! The decision was formally disapproved of by the King's Bench in *R.* v. *Johnson*, 2 Str. 824.

If the law has been correctly stated it follows that in effect a judgment of outlawry in treason is equivalent to a conviction until set aside, and that it can only be set aside by the outlaw surrendering himself and claiming the benefit of the statute of Ed. VI or applying in person for a writ of error, which must now be error in law. And this leads us to the consideration of the form of procedure in outlawry, a subject which, in view of the fate of the Attorney-General who appeared in *Armstrong's* case, we would respectfully commend to the attention of the Law Officers should they at any time propose to institute similar proceedings.

The first step in every case is to present a bill of indictment. It would probably be most convenient in the case of treason to do this in the King's Bench Division, or if presented elsewhere to have it removed there by certiorari. After the bill has been

duly found the next step is to issue a writ of *capias ad respondendum* to the sheriff of the county in which the prosecution was commenced. In treason one capias only is necessary (Hale, P. C. ii. 194), in other cases three are required.

The form of the capias is (omitting formal parts)—

'To the sheriff of ——, greeting. We command you that you take A. B. and him safely keep so that you may have his body before us at —— on —— the —— day of —— next to answer for certain treasons whereof he is indicted.'

If the return is that the accused is not found in the bailiwick, then the next step at common law is to issue a writ of exigent (*exigi facias*) to the same sheriff containing the following direction:—

'We command you that you cause to be exacted A. B. from County Court to County Court until he shall be outlawed according to the law and custom of England if he shall not appear. And if he shall appear that then you take him and him safely keep so that you may have his body before Us in —— on the —— day of —— to answer to Us for certain treasons whereof he is indicted and whereupon you have before returned unto Us that the said A. B. was not found in your bailiwick.'

By the law and custom of England the sheriff then has to cause the accused to be demanded at five successive County Courts (or in London at the Court of Hustings), and if he do not appear then judgment of outlawry is pronounced by one of the coroners of the county (except in London, where the Mayor by custom is coroner and the judgment is given by the Recorder). It is to be observed that the County Court is not the statutory court of that name, but the old court of the county which the sheriff now summons in accordance with the provisions of s. 18 of the Sheriffs' Act, 1887. If the sheriff is unable to make the necessary five exactions before the return day named in the writ of exigent, he returns accordingly, and a further writ of exigent with allocations is issued directing him to make the necessary additional exactions.

So far then as the common law is concerned the procedure in treason is not involved. But from time to time various additions were made by statute, with the object of preventing abuse of the process by the presentment of bills in counties where the defendant was not resident. In times of less constant communication proceedings could well be carried through to judgment without the accused becoming aware of them, and various Acts were passed to prevent this, requiring writs of capias to be issued, not only to the sheriff of the county in which the indictment was laid, but also to the sheriff of the county whereof the person indicted was alleged in the indictment to be conversant; and also requiring at the

time of issue of the writ of exigent. a writ of 'proclamations' to be issued to the sheriff of that County, directing him to proclaim the accused three times, once at a County Court, once at Quarter Sessions, and once at the door of the church of the parish where defendant was dwelling[1]. These provisions undoubtedly complicated the procedure and afforded further opportunities for proceedings in error. But it will be found on reference to the terms of these enactments (see especially 4 & 5 W. & M. c. 22) that they relate only to the case where the residence of the accused is stated in the indictment. The statute 1 H. V. c. 5 made it necessary to state in every indictment the towns or hamlets or places and counties of which the defendants were or be or in which they be or were conversant, and the provisions we have referred to depended on the presence of such particulars. But since 14 & 15 Vict., c. 100, s. 24, it has not been necessary to give these particulars in the indictment, and if they are omitted the provisions in question appear to be no longer applicable. Criminal proceedings cannot now be conducted without publicity, and the reasons which induced the legislature to dispense with the specification of the place of residence of the accused in an indictment may have had equal force in convincing them that the old statutory safeguards in outlawry are now no longer necessary. The procedure could be regulated by Crown Office Rules, but the present Rules (1886) do not apply to outlawry in cases of treason. R. 109 refers only to felony, and R. 113 makes it clear that felony does not include treason, a point which appears to have been overlooked in the Statute Law Revision Act, 1888.

So far, therefore, as the matter is to be decided by legal considerations, it appears certain that outlawry is still a valid process, and, if the view we have suggested be correct, the procedure in treason is comparatively simple, consisting only of one capias, followed by an exigent and judgment. It remains to be considered whether there are any objections of other kinds to enforcing outlawry in the present day. The Commissioners of 1879 in their Report on the Criminal Code Bill came to the conclusion that outlawry, though not formally abolished, had become practically superseded by extradition, and proposed therefore to abolish it—a conclusion which has been generally adopted in text-books. But with the greatest respect to the very high authority of that Commission, it may be doubted whether the case of treason was present to the minds of the Commissioners at the time they made their Report. The law of treason is apt to be forgotten in quiet times, and the immunity from serious internal trouble which this country has fortunately enjoyed for so many years has prevented the subject from attract-

[1] 6 H. VI. c. 1; 8 H. VI. c. 10; 10 H. VI. c. 6; 4 & 5 W. & M. c. 22.

ing legal attention: indeed it is remarkable that 'treason' is not even discussed in two out of the three leading text-books on criminal law. It may well be for reasons of this kind that in dismissing outlawry as an obsolete process, the fact that it is the only available form of punishment in crimes of a political nature had escaped notice.

It may be said that to condemn any person without trial is contrary to the principles of justice, and that forfeiture of estate is a form of penalty which the legislature has abandoned in other cases. But these objections are not of real weight. The outlaw, as we have shown, can always return within the year and insist on a trial; if he refuses to do so he surely cannot complain that he is condemned unheard. Moreover, the penalties of outlawry are not inevitable; the power of remitting or of mitigating them is in the Sovereign, and his advisers may be trusted to recommend an exercise of the Royal clemency on any proper occasion.

In one aspect there would appear to be an even greater necessity for some form of proceeding against fugitives now than formerly. In earlier days it was not easy to fly the realm: now within a few hours any person can put himself beyond the jurisdiction of the Courts. If there be no such process, fugitives who are not subject to extradition can secure complete immunity by remaining in foreign parts, and when time has effaced the evidence against them they can return to this country without fear of punishment. The only means of proceeding against such persons known to our law is outlawry, and it is difficult to suggest any other effective process for enactment which would not be open to the objections which can be urged against outlawry. Whether in any given case it may or may not be proper to proceed in this way is a question which must depend on particular circumstances. But that outlawry is to be put aside as obsolete, and for that reason never to be enforced in any case, however grave, is a proposition which at least would seem to require further consideration. Future generations may unhappily have to face more troubled times, and 'treason' may again be found in the indices of our text-books. Is it well to throw away a weapon which has been proved of service and which may be the only weapon available?

H. Erle Richards.

THE EXCHEQUER OF THE JEWS[1].

THIS volume has been brought out under the co-operation of the Selden Society and the Jewish Historical Society, and forms volume xv of the publications of the former society. Its appearance was awaited by legal scholars with much interest in the expectation that it would shed light upon a very dark chapter of English medieval law—the law of the Exchequer of the Jews. While the editor's Introduction and the texts now before us leave various interesting problems still unsolved, the volume is nevertheless a valuable addition to our published information upon the subject.

At the Record Office there are three collections of the archives of the Exchequer of the Jews: (1) Rolls of the Exchequer of Receipt, Joh.–Ed. I; (2) a heterogeneous assortment of documents, indexed as Accounts, &c.; (3) Plea Rolls. Mr. Rigg, the editor of the present volume, in attempting in the Introduction to 'focus the scattered lights shed upon the rolls by the Chronicles, records cited by Prynne, Tovey, Webb, and Madox, and other printed and unprinted documents,' has drawn for material upon the first two of these collections. The select pleas, starrs, and other records that go to make up the body of the book are taken exclusively from the third collection, namely, the Plea Rolls. Mr. Rigg's Introduction gives us a vivid and interesting sketch of the vicissitudes of the Jews in England from the time of the Norman Conquest until their expulsion by Edward I in 1290. There are stories of the charges brought against them for ritual murder, forgery, usury, and clipping and counterfeiting the coin of the realm, and of their talliages, fines, reliefs, and forfeitures; and there is also a consideration of such matters as their legal status, the law as to their lands and chattels, their loans and gages. The appendices to the Introduction contain such documents as the mandates of the king to the justices and the 'Articles Touching the Jewry.' The editorial work upon the Plea Rolls is scholarly, and the English translation of the original Latin and Norman-French texts, so far as we have been able to judge, is accurate. It is to be regretted that Mr. Rigg

[1] Select Pleas, Starrs, and Other Records, from the Rolls of the Exchequer of the Jews, A.D. 1220–1284. Edited for the Selden Society by J. M. Rigg. London: Bernard Quaritch. 1902. 4to. lxi and 152 pp.

has not discussed these texts in his Introduction, for they contain material of considerable importance for the early history of various branches of private law, such, for instance, as gages (see below), '*seisina*' of chattels (pp. 20, 21, 47, 101), agency and uses ('*ad opus*,' pp. 39, 53, 67, 68, 69, 72, 88, 94, 96, 112, 123). Some of these topics are not included in the 'Index of Matters.'

Upon the difficult question as to the precise nature and jurisdiction of the Exchequer the editor concludes that 'the Exchequer of the Jews, though it had its own seal and separate staff of officers, was not so much a separate Court as a branch of the Great Exchequer, invested with a jurisdiction never very precisely defined, and which never became, though it gradually tended to become, exclusive of that of the King's Court' (p. xxiii). The efforts of the ecclesiastical courts to secure jurisdiction over the Jews were unsuccessful (pp. xxi, xxv). The editor also refers (p. xxvi) to the fact that the Exchequer of the Jews, like the Great Exchequer, had in reality a twofold character—that it was at the same time both a financial bureau and a judicial tribunal. See Pollock & Maitland, Hist. Eng. Law, i. p. 470.

As to the personal status of the Jews, Mr. Rigg says that they were 'nothing more in law than the King's chattels, tenants at the royal will of all that they possessed' (p. xlii). The 'King's chattels' in a certain sense they surely were; but it should not be forgotten that although the Jew was the king's serf, he was notwithstanding a free man in his relations to all other persons except the king. See Pollock & Maitland, Hist. Eng. Law, i. p. 472.

The chief occupation of the Jews during the period in question was that of money-lending, and the system of registering their loans and gages, introduced largely for the convenience of the king when he wished to talliage his Jews or to seize their debts into his own hands, is of considerable significance in the medieval law of securities on property. Mr. Rigg has described this registry system very clearly, but one is left in some perplexity as to certain features of the Jewish gage. One suspects that the sources upon which the editor has drawn are often provokingly silent. A discussion of the texts in the present volume and a comparison of the Jewish gage with other forms of pledging property in English, Roman, and German law would, however, have helped to clarify the subject.

In order properly to understand the history of securities on property in the Middle Ages one must, it is believed, sharply distinguish between gages of land and gages of chattels, gages with possession of the debtor and gages with possession of the creditor, gages where the debtor retains proprietary right and gages where

there is a conveyance to the creditor; and then, when it comes to execution or the enforcement of the security on default in payment, one must further distinguish between forms where there is a forfeiture of the gaged thing to the creditor, where the creditor is given a right of sale, and where he has simply a right to take the rents and profits until the debt is extinguished. The forms of gaging land described by Glanvill (x. 6–12; xiii. 26–30), Bracton (f. 20, 268, 269), and Littleton (s. 332) were apparently all forms of security where possession was delivered at once to the creditor and where on default there might be a forfeiture of the land; and the '*mortgage*' of Littleton was indeed a conditional feoffment. The Jewish gage is instructive as perhaps the earliest English form of pledging land where the debtor was allowed to retain possession until default, for such an institution 'broke through the old law by giving rights in land to a creditor who did not take possession' (Pollock & Maitland, Hist. Eng. Law, i. p. 469; ii. pp. 123, 124). Mr. Rigg says that the gage or '*vadium*' of the Jews 'charged the debtor's lands as well as his chattels with the principal and interest,' and that 'on default in payment the creditor was entitled to seisin by a summary process, and might either sell the lands after a year's possession or hold them until he had satisfied himself out of the profits' (p. xiii). The securities known as 'statutes elegit, merchant and staple,' created by judgment of court or the enrolment of a recognizance, and introduced by legislation of Edward I and Edward III (Stat. West. II, 13 Edw. I, c. 18; Stat. Acton Burnel, 11 Edw. I; Stat. Merc., 13 Edw. I; Stat. Staple, 27 Edw. III, c. 9), are later illustrations of the same general conception, and if we come down to modern law we find in courts of equity a full recognition of this principle of allowing the debtor to remain in possession. If we look abroad we see the same idea underlying the Roman '*hypotheca*' (see Dernburg, Pfandrecht, i. pp. 50–95), the German '*neuere Satzung*' (see von Meibom, Das deutsche Pfandrecht), and the '*obligation*' of French law (see Franken, Das französische Pfandrecht im Mittelalter, pp. 1–36). The Jewish gage, created by 'contract of record' and without transfer of possession, seems to have been possible in feudal England largely because of the theory that the Jew had no place in the system of lords and tenants and because registration secured the publicity essential to such a form of gage.

Non-payment of the debt for which the land is gaged gives rise to a new set of problems, namely, problems connected with execution or the enforcement of the security. Mr. Rigg says that on default 'the creditor was entitled to seisin by a summary process.' Although it may well be suspected that some Jewish creditors late

in Henry III's reign were actually holding gaged land in fee (but see p. xiii), it certainly seems true that the Jewish creditor was usually given simply a '*seisina ut de vadio*,' a seisin 'for the mere purpose of levying a debt' (p. xxxviii, note 1). Was this '*seisina*' protected by a possessory action? Glanvill's gage had '*seisina ut de vadio*,' but this seisin was entirely unprotected by the King's Court; it was the gagor, and not the gagee, who could bring the assize of novel disseisin (Glanvill, x. 11; xiii. 28). On the other hand, the creditor 'by statutes elegit, merchant and staple' who took possession on default was given, in the words of the statutes and writs, a seisin '*ut liberum tenementum*' and the freeholder's possessory remedies. Notwithstanding all this, however, he had no estate of freehold, but simply a 'chattel real' that descended to his personal representative, the '*ut*' being, in the language of Lord Coke (Co. Lit., 43 b), merely 'similitudinary.' The courts seem to have taken this view largely for mercantile reasons.

The Jewish creditor 'might either sell the lands after a year's possession or hold them until he had satisfied himself out of the profits.' This early appearance in our law of the gagee's right of sale is worth noting (compare pp. 2, 18, 104, 111), for apparently the gagee of Glanvill, Bracton, Littleton and the 'statutes' had no such right in the Middle Ages. The gage of these early text-writers was enforced, under certain circumstances, by forfeiture, and apparently this was not possible in the case of the Jewish gagee (but see p. xxxvii) or the creditor 'by statute.' The right of the Jewish gagee who did not sell and of the creditor 'by statute' seems to have been simply that of satisfying himself out of the profits (see also pp. 19–27). This is the principle of the Glanvillian *vivum vadium* (Glanvill, x. 8; Robbins, Mortgages, i. pp. 1, 2).

Various questions present themselves in connexion with the Jewish gage, some of which might possibly be answered by further investigation. Was the gagee obliged to pay the debtor the proceeds of the sale over and above the debt and interest? What was the rule of the Exchequer as to priorities? Did the Exchequer also protect a form of security on land with immediate delivery of possession to the creditor (see p. 42)? '*Mortuum vadium*' or '*mortgage*' meant one thing to Glanvill and another to Littleton, while the corresponding term of German law (*Todsatzung*) has still a third significance. If the Jewish '*mortuum vadium*' was a rent-charge (see pp. xiii, 13, 80, 136), have we here a fourth meaning?

A pawn or pledge of chattels with immediate delivery of possession to the creditor is found on the Plea Rolls (see pp. 4, 8, 64, 102, 103–104, 106, 107, 111, 115), and the Jewish debtor seems also to have 'charged' his chattels as well as his lands (see pp. vii, 34, 39,

40, 47, 51, 68, 71, 91, 93, 94). Did this 'charge,' with possession of the debtor, give the creditor a right to follow the chattels into the hands of third parties? Such a right seems to have been denied the creditor 'by statute' as to chattels bound by the recognizance (see Ro. Abr., ii. 472; Bac. Abr., tit. Execution). Is the doctrine involved in the denial of such a right connected with the principle of medieval law expressed by the phrases *Mobilia non habent sequelam* (*Les meubles n'ont pas de suite, Hand wahre Hand*)?

H. D. HAZELTINE.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

A Treatise on International Public Law. By HANNIS TAYLOR, LL.D., late Minister Plenipotentiary of the United States to Spain. London: Sweet & Maxwell, Lim. 1902. 8vo. lxxvi and 912 pp. (30*s.* net.)

THIS book, in the title of which it will be observed that the author has adopted Professor Holland's order of the words 'international' and 'public,' is probably on the whole the fullest treatise in the language on its subject, in the number of points touched on and that of the cases, diplomatic and judicial, referred to. For undertaking such a work Dr. Taylor appears to have possessed two important qualifications, that of diplomatic experience, as we are informed by his title-page, and that of considerable familiarity with law. For he tells us (p. 680) that the famous Captain Semmes of the Alabama 'after the close of the civil war practised [as a lawyer] for many years at Mobile, where the author often took part with him in the trial of causes, civil and criminal'; and he promises us (p. 155) a work on international private law. We are of opinion that the work has been performed in a manner which corresponds to those qualifications, and that it may be welcomed as a valuable contribution to the literature of the subject. The style is concise and business-like, and the arguments, judgments, and diplomatic and other international facts, as well as the author's own conclusions, are put briefly but clearly; thus the quantity of matter contained is even greater than might be expected from the number of pages. On the other hand the 'List of authorities cited' is deficient in the most modern ones. Among others there is no mention of Pillet, Despagnet, Ullmann, Max Huber, nor, most remarkable of all, of Rivier's great work of 1896.

In a United States writer we naturally turn first to what concerns that country, and we are pleased to be able to say that Dr. Taylor's attitude with regard to those questions is remarkably free from bias. We cannot indeed agree that the desire of getting the Nicaragua canal promptly constructed, and of bringing in other powers as parties to the arrangement, entertained by the negotiators of the Clayton-Bulwer treaty, were conditions of that treaty, so that the failure to realize them made it voidable (p. 148). But that question has been happily disposed of by the new canal convention, and where Dr. Taylor decides in favour of England, which is about as often as the present writer would, it is always frankly. Particular attention may be called to his view about the position of his country in the American hemisphere. Believing that to reprobate intervention between states—we are not speaking of intervention in internal affairs—to the extent that some do, is inconsistent with there being any society of states, we have not much quarrel with the rather miscellaneous body of maxims that has come to be known as the Monroe doctrine, so long as it is regarded as

belonging to United States policy and not to international law, and so long as it is not acted on in the needlessly offensive way taken by President Cleveland in the Venezuela question. Captain Mahan has recently said that for the States themselves it would not be wise to carry that doctrine further south than the valley of the Amazons. However that may be, even if it were carried to Cape Horn we should regard it as a policy not antagonistic, in most conceivable cases, to the best interests of the Old World. But Dr. Taylor's tendency, perhaps rather intimated than stated, is to treat the Monroe doctrine, in its largest extent, as now forming a part of international law and binding on the Old World. He calls its result 'the overlordship asserted of late years in the New World by the government of the United States' (p. 426). With this we cannot agree, and we would suggest to the learned author that that way of putting the case is for him particularly unnecessary, because, if we understand him rightly, he inclines, as we do, to the wider views of principle on the subject of intervention.

Connected with the topic last noticed is the somewhat exaggerated aspect under which Dr. Taylor presents the predominance of the great powers in Europe, to which he also gives the name of overlordship, and represents 'the legal rights of the theoretically equal European states' as 'held subject to' it (p. 98). It is probably his prepossession in favour of parallel overlordships in the two worlds that has betrayed him into something very like an inaccuracy, where he says: 'As Prince Bismarck expressed it at the opening of the Berlin Congress, the plenipotentiaries there assembled met for the purpose of submitting that treaty [San Stefano] to the free discussion of the cabinets, signatories of the treaties of 1856 and 1871, because it attempted to modify without their consent the state of things as fixed by former European conventions' (p. 399). The words 'without their consent' are here interpolated in what is otherwise a correct quotation of the prince, who did not mean to imply, as those words might do, that any consent was necessary to the validity of the terms concluded between Russia and Turkey, but that the major interests of Europe called for their revision, or rather might so call, the language in question having been used at the opening of the congress. The authority of the great powers does not go beyond what results from the two propositions—first, that which lies at the base of the doctrine of intervention between states, and is true but still controverted by some, namely that every power, great or small, not bound to a permanent neutrality, has the right to act on its view of the major interests of Europe, and indeed of international justice—secondly, what is not only true but incontrovertible, that when the great powers so act in concert they are irresistible.

We will now notice some points which may be commended to Dr. Taylor's consideration. In § 133 he says that neutralized states are only part-sovereign, a term which we agree with him is more accurate than semi-sovereign. Is it not the truer view that a state suffers a *capitis deminutio* only when it renounces some of the functions of a state, and not when it merely agrees to abstain from certain exercises of those functions? The present writer may refer to his *Notes sur la Neutralité Permanente*, in the *Revue de Droit International et de Législation Comparée*, 2^me^ *série, tome* 3. In §§ 134 and 138 there seems to be a little confusion as to whether protected states are persons in international law. Of course they are such persons so long as they have foreign relations, although those relations may be directed for them by the protecting state. In § 137 Canada is called a dependent protected state, although in § 122 the truth is admitted

that all British territories are embodied in an incorporate union. In § 165 the rendering of *hypotheke* or *dette hypothéquée* by 'guaranteed loan' seriously interferes with the intelligibleness of the passages translated from Heffter. The statement of Roman law in the note to § 217 should be reconsidered. In § 465, the condemnation of the Berlin banker Güterbock, for dealing in securities issued by the French Government during the war, should not have been quoted in support of the proposition, true for England and the United States, that 'war suspends civil intercourse of all kinds between the belligerent nations and between their respective citizens.' The note in Geffcken's Heffter which is referred to alleges the aid to the enemy resulting from the particular kind of dealing as the ground of the condemnation. We have also noticed some regrettable slips of the pen or oversights. Thus in § 228 the words 'by the law of nations' are retained in a quotation from Wharton, speaking of the navigation allowed by the United States in the Mississippi, though Dr. Taylor shows (as indeed does Wharton also) that he is well aware the law of nations gives no right to foreign ships in rivers flowing entirely within one territory. And on p. 317 a sentence is so worded as to make Grotius posterior to the peace of Westphalia, though the date of Grotius is given, and his position in the history of international law is examined at some length, in part ii, chapter iii.

We turn to the more agreeable task of noting Dr. Taylor's opinions on some controverted points, since we believe that, in a science in which opinions count, his will in future be quoted. In § 339 he adopts the view 'that every treaty is void, or at least voidable, that conflicts with certain principles which established usage has fixed as the foundation stones of modern international policy. Such principles are those which forbid the domination of the entire world by a single power; the acquisition of proprietary rights over the open sea; the subjugation or partition of a state, unless its existence is entirely incompatible with the general security; the imposition by treaty of conditions inconsistent with the existence or development of a state, and the acquisition by treaty of rights previously vested in other states.' In § 499 he mentions, apparently with sanction, Admiral Aube's advocacy 'of bombardment, together with the levy of heavy contributions, in case of war with Great Britain.' In § 518 he condemns the detention by France of the seamen captured on board German merchant-ships. In § 525 he vindicates his impartiality by declaring it not 'permissible to put prominent people of the country on railroad trains in order to insure the safety of traffic, as was done during the war of 1870–1.' In § 547 he argues in favour of maintaining the capture of private enemy's property at sea, independent of the cases of blockade and contraband, requiring however that it should be paid for. This comes near to the view that in such cases sequestration should be substituted for condemnation, of which more will probably be heard in future. In § 624 he considers that the United States were within their legal right in selling arms and stores to France during the war of 1870, but that they would have done better not to exercise that right. In § 664 he condemns the claim often made by belligerents that neutral governments should restrain the export of contraband of war.

We should have been glad to know Dr. Taylor's opinions on the right of a state to punish acts committed against its safety or sovereign rights by foreigners on foreign soil, and on Lord Derby's memorable attempt to whittle away the liability under a collective guarantee; but on these matters we get only non-committal statements of the conflicting views (§§ 191 and 352).

We now take leave of a work of which the size and price would in any case prevent its being used as a classbook, but which, from its merits as well as for the great mass of information it contains, is certain to rank as a book of reference for advanced students and public men.

J. W.

Key and Elphinstone's Compendium of Precedents in Conveyancing. By Sir H. W. Elphinstone, W. H. Coltman, and A. Dickson. Two vols. London: Sweet & Maxwell, Lim. 1902. 8vo. Vol. I, cx and 1047 pp.; Vol. II, cvi and 998 pp. (£3 10*s.*)

It is a comparatively short time since the sixth edition of this standard work was published: but Key and Elphinstone's Precedents have become indispensable to conveyancers; and we congratulate the learned editors on this evidence of the success of their last edition. Amongst the new matter introduced into the present edition are some useful conditions of sale of a building estate in small lots (i. 934 seq.). There is also a precedent (i. 943) intended to carry out a remarkable scheme for evading the difficulty now attendant on completing a sale of unregistered land in a district where registration of title is compulsory on sale, when part of the purchase money is to be raised by a subsequent mortgage of the land. At present, as the editors observe (i. 943, *n.*), notwithstanding the provisions of the Land Transfer Rules [1898] No. 78, the vendor in such a case objects to parting with his legal estate without getting his purchase money, and the mortgagee objects to parting with his money before obtaining his legal charge and consequent certificate of charge. To obviate this difficulty it is suggested that, the vendor and purchaser having entered into the usual written contract of sale, the vendor shall execute a mortgage of the land to the person advancing part of the purchase money, the purchaser covenanting to pay the mortgage debt, and there being a proviso for redemption by the *vendor*, his heirs, executors, administrators or assigns, and a further proviso that the vendor, his heirs, executors or administrators shall not be personally liable for the mortgage debt. According to the editors' note, the right of redemption is so reserved to the vendor in order to avoid the necessity of registering the deed as a conveyance on sale. It is not stated when the balance of the purchase money is supposed to be paid: but the mortgage deed is to contain a covenant by the purchaser not to register himself as proprietor of the land. It cannot be supposed that the vendor would execute such a deed without payment of the whole purchase money, so it is presumed that the intention is that the purchaser should pay so much of the purchase money as was not to be secured by the mortgage at the same time, and should rest content with the equitable estate passed to him by the contract. It is submitted, however, that a purchaser could not be advised that it is safe for him to complete a purchase in this manner. The mortgagee, no doubt, would get a good legal estate; but owing to the form of the proviso for redemption suggested the purchaser would claim, not under a conveyance of the whole legal estate from the vendor, but merely under an assignment to him of the vendor's equitable interest in the premises. That is to say, he would only take such estate in the land as the vendor actually had in equity; and he would be subject to all prior equities therein, against which he would be in no position to plead the defence of purchaser holding the legal estate for value and without notice. In fact, he would

be in the position of the purchaser of an equity of redemption; a kind of property which is not usually recommended as a safe investment. We are surprised that there is no hint in the notes of the disadvantages attaching to the scheme.

We have carefully perused all the precedents of and forms for insertion in agreements for the sale of land by private contract, and we find the same defect on which we commented in our review of the fifth edition. There is not a single precedent of any clause or provision to the advantage of the purchaser. There is the same statement (i. 331, *n.*) as before that forms of conditions of sale by auction 'are applicable for the most part with little (if any) alteration to sales by private contract,' and that 'the conditions usual on sales by auction are very commonly, notwithstanding the stringency of some of them, submitted to by purchasers on sales by private contract.' We think that this statement tends to place before the conveyancer, whether counsel or solicitor, advising an intending purchaser an entirely false conception of his duty. The conditions of an open contract, as now settled by statute, are in many respects notoriously unfair to purchasers; the common conditions of London sales by auction are still more so. This fact is recognized by many provincial law societies, whose common form conditions of sale contain several stipulations placing the purchaser in a better position than he would be under an open contract. Perhaps the best example of this is afforded by the common form conditions of sale of the Birmingham Law Society. A conveyancer settling conditions of sale by auction is of course justified in making them as stringent as he thinks purchasers will swallow; for he is advising the vendor only. But in acting for an intending purchaser by private contract, he certainly does not discharge his duty by tamely submitting to the conditions usual on sales by auction. And we submit that he should not be encouraged to suppose that he does right in conforming, without any attempt to get better terms for his client, to the course too often followed in practice.

We note that the editors hold, more strongly than before (i. 321, *n.*), to the view first expressed in their last edition, that an unlimited power of entry given either by express words or sect. 44 of the Conveyancing Act, 1881, on the grant of a rent-charge in fee, and allowing the grantee to hold until the arrears of the rent are satisfied, is obnoxious to the rule against perpetuities; and that they advocate (i. 442, 569) the use, as a common form, of a proviso confining such a power to the limits allowed by the rule. No doubt this secures the bird in hand: but it is a departure from the previous regular practice of conveyancers, and for our own part we prefer the more robust opinion expressed by the late Mr. Key in the fourth edition of this work (i. 335, *n.*), that as regards enforcing payment of the rent the power to enter and hold till the arrears are satisfied would seem to be unimpeachable. In connexion with the subject of rent-charges, we may notice the form (i. 668) of indemnity to a purchaser against a rent-charge by creation of another rent-charge to issue out of other property of the vendor. In this form (which was drawn in the same way in the fourth edition, i. 719) the vendor grants the land, out of which the new rent-charge is to issue, to the purchaser in fee to the use that he may have the rent-charge in fee with the usual powers of entry and distress, and subject thereto to the use of the vendor in fee. Now we do not doubt that the purchaser would in this case get the benefit of the rent-charge intended: but we submit that this is not elegant conveyancing, and that, having regard to the terms of sect. 4 of the Statute of Uses,

that where some persons are seised of lands to the use that *others* shall have a rent issuing thereout, &c., it is proper that this transaction should be carried out by means of the interposition of a third person as grantee to uses.

We have no space for further detailed criticisms. As we have already remarked, the work is indispensable to conveyancers; and in the hands of the expert it is a most valuable book of reference. But, as the examples on which we have commented show, it cannot always be relied on as imparting sound instruction to inexperienced practitioners. In this respect, it does not fill the place occupied, as regards the old conveyancing practice, by Davidson's Precedents, in which the notes and dissertations afforded a sure guide, not only to the accomplished draftsman, but to the student as well. T. C. W.

De la Déclaration de Volonté. Contribution à l'Étude de l'Acte Juridique dans le Code Civil Allemand (art. 116 à 144). Par RAYMOND SALEILLES, Professeur à la Faculté de Droit de l'Université de Paris. Paris: Librairie Cotillon. F. Pichon Successeur. 1901. 8vo. xiv and 423 pp.

THE French Government have instructed a number of French jurists to produce a translation of the German Civil Code, allotting a separate part to each of the learned gentlemen entrusted with this task. The general part of the Code has fallen to Professor Saleilles' share, and, like a true scholar, he has carefully studied the history and contents not only of this part but of the whole Code and other German statutes connected with the subject, before starting the actual work of translation; the result of his researches, in so far as it affects the sections of the Code mentioned in the title, has been embodied in the work which is now before us. Professor Saleilles' notes have a special value as they not only represent the quintessence of the best German work on the subject, but also contain the criticisms of an acute and learned writer, including instructive comparisons with French law. An act in the law (*acte juridique, Rechtsgeschäft*), according to the terminology of the German Code, is an act on the part of the party concerned intended to produce a result recognized by law and producing such result by reason of such intention. An act in the law may be unilateral (e. g. a testamentary disposition, a notice, the occupation of vacant land, &c.) or bilateral (e. g. a contract), but in either case some outward act is necessary by which the intention of the author of the act is manifested. This outward act is called 'declaration of intention' (*Willenserklärung*). It is one of the features of a systematized body of law that rules, formed separately for the several kinds of transactions to which they refer are harmonized together and applied by the light of general principles applicable to all transactions generally. In this way the German Code gives a general body of rules relating to the interpretation of all declarations of intention and to the effect thereon of mistake, fraud, duress, illegality, &c.; these rules form the second part of the chapter of the Civil Code relating to acts in the law (being itself the third chapter of the general part of the Code), and are the subject of Professor Saleilles' notes, which, though perhaps too elaborate for beginners, will be of great assistance to readers having a general knowledge of the problems to which they refer. E. S.

Der Wechsel und seine civilrechtlichen Grundlagen. Von Dr. CARL WIELAND, Professor in Basel. Basel: Schwabe. 1901. 8vo. xx and 310 pp.

THIS book deals with some of the theoretical aspects of the law affecting the rights and liabilities of parties to bills of exchange. It is intended to refute some of the views prevalent among continental writers and therefore hardly intelligible to readers not familiar with the controversies on the subject. Readers acquainted with these will find the book interesting and suggestive in many parts, notwithstanding the fact that they will probably disagree with many of Professor Wieland's views and will also be inclined to think that the labour bestowed upon some of the topics discussed by him is somewhat out of proportion to their practical importance. E. S.

An Encyclopaedia of Forms and Precedents other than Court Forms. By Eminent Conveyancing and Commercial Counsel. Under the General Editorship of ARTHUR UNDERHILL, assisted by CHARLES OTTO BLAGDEN and WILLIAM E. C. BAYNES. Vol. I. Abstracts of Title to Appointments. London: Butterworth & Co. 1902. La. 8vo. xlviii and 675 pp.

THIS volume is the first instalment of a somewhat ambitious undertaking. The authors intend to make a complete collection of all precedents other than Court forms which can be useful to the legal practitioner. The editor-in-chief, Mr. Underhill, is well known as the author of accurate and learned treatises on the law; he is assisted by consulting editors, all of whom are well known as sound and practical lawyers. We therefore expected that this book would attain a high stand of excellence, and we have not been disappointed.

The larger number of the precedents in this volume are perhaps more adapted for the use of solicitors than of counsel: for example, counsel do not settle abstracts or accounts. If all solicitors would follow Mr. Underhill's advice as to the preparation of abstracts, they would save a great deal of trouble and expense. Nothing is more irritating to the conveyancer than to receive an imperfect abstract; he has to draw requisitions which would have been absolutely unnecessary if a proper abstract had been furnished in the first instance. He may also have to waste a great deal of time in endeavouring to ascertain the meaning of insufficiently abstracted documents. Mr. Underhill gives at p. 57 et seq. an example of a faulty abstract containing blunders of frequent occurrence with requisitions arising thereon and the replies. It will be found on examination that none of these requisitions would have had to be made if the abstract had originally been drawn correctly.

The notes on and precedents of Sales of Advowsons and next Presentations are full, accurate, concise, and will be extremely useful, particularly as they include the forms, extracted from the Benefices Rules 1898, as to registration of conveyances under the Benefices Act 1898.

There is a large collection of agency documents, both as to commercial and non-commercial agents. At p. 25 et seq. will be found the documents to accompany a power of attorney for use abroad. We note that no information is given as to the clauses that ought to be inserted in, or as to the execution of, powers of attorney to be used in the Colonies.

The forms as to Allotments, Small Holdings and Small Dwellings will meet all the cases of common occurrence; we congratulate the editors on

the manner in which they have stated the provisions of a large number of Acts relating to these matters.

We are rather surprised to see many precedents of annuity deeds, as in our experience they are not of very common occurrence except when granted by an assurance office or created under statutory provisions. The learned reader will be somewhat amused on perusing the Precedents of Apologies.

The appointments under powers are divided into appointments of interests in real estate including leaseholds and appointments of interests in pure personalty. There is a large number of precedents. We observe that (at p. 651) a precedent is inserted, which so far as we know is not to be found in any of the ordinary books in Conveyancing, intended to meet a common occurrence where an appointment is made to a child and an immediate advance is to be made under the power of advancement.

The editors are of opinion (see the notes at pp. 613, 614) that the rule that where a life estate in freeholds is limited by deed to an unborn person, a remainder to a child of that person is void, does not apply where the limitations are equitable. They give, however, no authority for this opinion that they express, and therefore notwithstanding the great weight that it carries, practitioners would hardly be safe in acting upon it.

We observe from the precedent at p. 554 that the editors take the view that at the present day a jointress should not be restrained from anticipation, a view that has the very high authority of Mr. Wolstenholme (see Forms and Precedents, p. 131, note). It will be remembered that where a jointure is created before 1883 the wife cannot during the coverture dispose of it except by deed acknowledged, so that she has some protection against the importunity of her husband or his creditors, but that on the other hand if the jointure is created after 1882 she can at any time dispose of it. For this reason, as pointed out in Elph. Introd. Conv. p. 375, many practitioners restrain the woman from anticipating her jointure, so as to render it inalienable during coverture; and this is the practice followed by Prideaux and Key and Elphinstone. As the matter is of considerable importance we hope that in a subsequent volume the editors will state their reasons for the form that they have followed.

We have not observed any errors likely to form traps for the inexperienced practitioner, and we feel confident from the specimen before us that the book when complete will be very useful to both branches of the profession.

The Law of Coal, Coal Mining, and the Coal Trade. By JOHN HENRY COCKBURN. London: Stevens & Sons, Lim. 1902. La. 8vo. lv and 930 pp. (36*s.*)

THIS is a comprehensive and sound treatise by a solicitor, who appears to be intimately acquainted with all the legal questions to which mines and mining are wont to give rise.

The principal title is perhaps too modest, in that it suggests that the work is chiefly concerned with coal and coal mines, whereas in fact it treats impartially of all kinds of mines and of the working and trading in minerals. Moreover there are chapters on branches of the law that are only incidentally connected with mines and minerals, but a knowledge of which cannot but be useful to owners and managers of mines. Thus there is a chapter on rates, taxes, and duties, including income tax, death duties, and the new export duty on coal.

There are also concise summaries of the law of master and servant, of principal and agent, of the sale and carriage of goods, of shipping, of trade unions, and of compensation under the Lands Clauses Acts. The Employers' Liability Acts and Workmen's Compensation Acts are judiciously dismissed in a single paragraph.

Now it is obvious that many of these subjects require separate treatises for anything approaching to adequate treatment, and we are not sure that Mr. Cockburn would not have exercised a wise discretion if he had omitted some of them entirely. Though his statements of the law therein seem to be generally accurate as far as they go, they are necessarily too brief to be of much use to the practising lawyer, whilst possibly full enough to be traps for the layman for whose use the treatise is in part intended. Short summaries of such Acts as the Factory and Workshop Act, and the Public Health Acts, cannot, we think, be of much use to any one, and the law of Principal and Agent cannot be properly stated in five pages, or Company Law in fifteen.

In his exposition of the law of mines and mining proper Mr. Cockburn is of course more detailed than in the fringe of his subject. And these chapters, whether for lawyer or for layman, leave nothing to be desired. The law is expounded clearly, accurately, and in logical order.

Indeed nowhere have we found any serious misstatements, though in the outlying portions of the subject there are statements to which exception might be taken. Thus the effect of *R.* v. *Poulter* (20 Q. B. D. 132), and of *Quinn* v. *Leathem* [1901] A. C. 495, might have been much more accurately given at pages 431 and 651 respectively, if the cases had been more carefully studied, or even if extracts from the headnotes had been used, instead of the author's own somewhat loose expressions.

On pages 649 and 650 there is a curious contradiction. On the one page it is stated, on the authority of *Lyons* v. *Wilkins* [1896] 1 Ch. 811, that 'though specific persons connected with a trade union may, the trade union itself may not, be restrained from picketting'; whilst on the next page it is stated, correctly, that a trade union may be sued in its corporate name and injoined from unlawful picketting. It is notorious that, so far as *Lyons* v. *Wilkins* can be taken to have decided the first proposition, it was emphatically overruled by the *Taff Vale* case [1901] A. C. 426.

Mr. Cockburn's encyclopaedic work would have been more trusted by lawyers, though less valued by laymen, if he had confined it to those branches of the law with which it is more immediately concerned.

Not the least valuable feature of the treatise is the giving of 'practical hints,' no doubt gained from the author's own experience, upon many matters of common occurrence. We are confident that the work will be largely used and much valued in mining circles and by lawyers.

Precedents of Conditions of Sale of Real Estate, Reversions, Policies, &c. By Frederick Edward Farrer. London: Stevens & Sons, Lim. 1902. xlvi and 266 pp. (16*s.*)

The main plan of the book is to present a collection of precedents of both general and special conditions of sale, to which notes are appended stating the effect of the authorities with regard to the subject dealt with by the condition. The forms are, however, preceded by short introductory chapters dealing with general rules for preparing particulars and conditions, the position of the auctioneer, sales by mortgagees and trustees, unilateral mistake and hardship as defences to specific performance, the

remedies of the purchaser after completion, and parol variation of the written contract. And there is an appendix on Sales by the Court, and another on Vendor and Purchaser Summonses. The author has made a collection of authorities which will be very useful to practising conveyancers; and they are arranged in a manner convenient for reference. We think, however, that his statements of the result of the cases cited will require to be tested with care. For example, on p. 66, it is stated that *Want* v. *Stallibrass*, L. R. 8 Ex. 175, is in effect overruled by *Saxby* v. *Thomas*, 64 L. T. 65, and *Scott & Alvarez* [1895] 2 Ch. 603. But the true principle to be extracted from the first and the last of these cases is, it is submitted, entirely different. In the first, the vendor showed on the face of his own abstract that he had no title to sell; and it was held that the purchaser might recover his deposit, notwithstanding that he had not made the objection within the time limited by the contract for sending in requisitions on title. The reason appears to be that the vendor on his own showing had not performed that obligation to show a good title which is an essential part of the contract of sale of land; so that there was such a breach of contract by the vendor as entirely discharged the purchaser from his part of the agreement. It is something like the difference, on a sale of goods, between breach of a warranty and total failure to deliver merchantable goods of the description contracted for. In *Scott & Alvarez*, the purchaser only escaped being obliged to perform the contract specifically by going outside the abstract he had contracted to take. He appealed unto equity: but to do this, he was himself obliged to break the contract at law. So that at law, the vendor was entitled to say, I performed all I undertook; you did not keep the contract. As for *Saxby* v. *Thomas*, in that case the Court of Appeal held that the vendor *had* shown a good title, and refused the return of the deposit on that ground. When the author discusses (p. 6) the question whether the deposit can be recovered, where the Court refuses to decree specific performance at suit of the vendor on the ground that the title is too doubtful to force on an unwilling purchaser, he does not refer to *Scott & Alvarez*. Again, in the Appendix on Court Sales, the author remarks that the vendor 'is not concerned, it is thought (but see [1900] 1 Ch. 374), to inquire whether the Court has jurisdiction to sell or not.' Then in the next paragraph he states s. 70 of the Conveyancing Act, 1881. This will not of course mislead the expert, but it may prove a dangerous guide to the inexperienced. The opening chapter in the book seems to be addressed to the student. And what the student requires to know about sales by the Court is that the conveyancer advising the purchaser had formerly to satisfy himself that the order for sale was in all respects rightly made and properly carried out. Now, he has to satisfy himself either that this is the case or, if not, that the defect may safely be disregarded in reliance on s. 70 of the Conveyancing Act.

A Contribution to an English Translation of Voet's Commentary on the Pandects, comprising all the Titles on Purchase and Sale, Letting and Hiring, Mortgages, Evictions, Warranty, and allied subjects. By T. Berwick, late Judge of the District Court of Colombo. London: Stevens & Haynes. 1902. 8vo. xvii and 557 pp. (24*s*. 6*d*. net.)

After Roman law had emerged from the dark cloisters of Italian schools and monasteries, and had been widely received in the Middle

Ages, the French Universities took the lead in the study of the Pandects, codes, and law books of the Roman jurisconsults. Religious persecutions, however, here as in so many other instances, stopped the progress of culture and drove the learned away. The massacre of St. Bartholomew may be taken as a date when the Dutch took up the task which had been partially abandoned by the French. They soon became pre-eminent in paraphrasing and explaining the civil law as codified by Justinian. Not content with this, however, they devoted special attention to legal history, and their proficiency in these studies gave a peculiar character and value to their labours, and thus formed the Dutch school, which, together with the Spanish, may be said to have been mainly instrumental in advancing the study of civil law during the seventeenth century and the first half of the eighteenth.

If any weight be attached to the legal thoughts of Roman jurists, the importance of their researches can hardly be over-estimated. The study of Roman law has gone through several stages, from the mere commentaries of the earlier centuries to the historical and analytical dissections of modern times. So continually has it formed a subject of new and more elaborate methods of explanation, that its study may be grouped into distinct areas of development. Thus the history of each epoch becomes not only interesting, but necessary for the understanding of the whole structure of modern Roman law.

Justinian's codified law of the sixth century was recognized throughout civilized Europe as a source of legal wisdom, and the principal guide in the administration of justice. It formed the fundamental basis of legal thought in France, in Holland, in Germany. The learned jurists at the Dutch Universities, as practical men, went a step further than the mere commentators of former days, and did not reproduce in their works the pure law of the Romans only, but gave it adorned and enriched with the decisions of the courts, and their own opinions. We do not find in their books the law as it was in the time of Justinian, but the law as it was in their own days, based, however, on Roman principles. Thus they created a Roman-Dutch law, of which the Roman law formed the most important part, with Dutch additions consisting of judgments, local laws, and customs.

Those among them who were more particularly concerned to explain the civil law as it appeared in Justinian's codes—to which in notes of their own the law of their times was added, either by way of explanation, or example, or as diversion from the original ideas—remained the true interpreters of the civil law, and the value of their works still remains indefeasible. They kept Roman law alive, tested by the ordinary occurrences of daily life. As society moves forward, relations and circumstances alter and sometimes demand new provisions to meet their requirements. But the principles laid down by the ancients remain applicable, and the more extended the interpretations the more clearly those principles are brought to light.

Of these interpreters Johannes Voet was the most famous.

If ever the history be written of the memorable struggle between the Roman-Dutch and the English law in H.M.'s colonies, the historian will be able to point to two remarkable features.

Firstly this. While on the one hand—especially since von Savigny published 'Das heutige Römische Recht' and thus laid the foundation of the historical school—the influence of civil law has become more marked and felt in England; on the other hand many of the judges and lawyers

in the colonies have used their best endeavours to supplant the old maxims by modern English law, the excuse being that Roman law was out of date and place.

Secondly. While the most learned jurists in the United Kingdom are accustomed to treat with the greatest respect the expounders of Roman-Dutch law, their treatises would be relegated to obscurity if some of the lawyers who go out to the colonies from the mother country had their way.

Why? Is it ignorance? Is it because those only who know have learned to appreciate? Is it because no other qualifications are required for admission at the Colonial Bar besides the knowledge gained in the English and Irish Inns of Court?

A cry has been raised for the abolition of Roman-Dutch law altogether, and to have one English law in the whole empire. Why? Has the historical school lost all value, and is no weight to be attached to the doctrine that law should grow with the people? Are the colonies considered to have no history of their own? Must they simply imitate and adopt the principles and maxims of law which are the product of purely local English historical causes? Must this be so, even with those who pride themselves on having attained, or whose ambition it is to attain, self-government?

The translated chapters of Voet's commentaries, which are now before us, treat of sale and purchase, eviction and warranty, letting and hiring, and pignus and hypotheca. It is alleged that with regard to these very contracts (common in Rome as they are in England and elsewhere) modern life has developed new requirements, and it is loudly claimed that the provisions of the Roman law should be replaced by their English equivalents. Is there then no possibility for self-development of the law in existence? Is it an urgent necessity that in providing for such new requirements the clear and concise doctrine of consent and delivery should give way to the not always logical and sometimes artificial doctrine of consideration and passing of proprietary rights without delivery? Are we convinced that the *jus in re aliena* (the right of hypotheca) historically developed from the Actio Serviana and the foundation of a widely extended, clear, and logical system of modern growth should be replaced by the cumbersome English system of mortgage with its still unfinished development in equity?

The adoption of English law means the destruction of the wise maxims which underlie the Roman-Dutch law, and yet these maxims form the characteristic basis of development along the lines of modern social life.

One thing is certain. Roman-Dutch law owes its unpopularity largely to the fact that it is enshrined in Latin and Dutch, neither of which is always familiar to those who have to interpret its principles. To this, however, there is a remedy, and Mr. Berwick and his publishers have shown the way in splendid style.

If there be use for a good book, it should be printed in the language of those who have continually to make reference to it. The Dutch jurist, Simon van Leeuwen—one of the first to break with the custom of former days, of expressing learned thoughts in the language of schoolmen—reminds us of this in the preface to his 'Roman-Dutch Law.' His readers at the time were principally Dutch, those of the present day are better versed in English.

Though a complete translation of the 'Commentarius ad Pandectas' has never been undertaken, several portions of the work have seen the light in

English. Voet follows the division of the Digests book by book and chapter by chapter. Twenty of these books have been edited in English, mostly in South Africa. Some of them have found more than one translator. Thus there are other English versions of the first three books contained in the present volume, viz. those on the Contract of Sale and Purchase (Book XIX), Letting and Hiring (Book XX), and Pledges and Hypothecs (Book XXI), from the hands of Sir R. K. Wilson, W. Salomon, A. W. Mason, and John J. Casie Chitty.

There is no doubt that with all of these—shall we say competitors?—the former Colombo judge can hold his own. Though following closely the Latin of Voet, the translation is clear, easy of comprehension, and expressed in pure English. The translator has evidently taken great pains to find the exact English equivalent for the Latin of the author. It does not require much study to enable one to appreciate Berwick's thorough knowledge of both languages, the one in which he writes and the one from which he translates.

There is more. Berwick is not satisfied with a mere translation. In a large number of footnotes the example of the old masters has been followed, and a short commentary has been written on Voet's commentary. These notes, in which the translator displays an intimate knowledge of the Pandects, add to the clearness of the text, and render the work a specially valuable guide to the practitioner and the student in finding the law, which is one of the chief objects aimed at. This would have been so to an even greater extent, if book, title, and paragraph had been cited in the margin of every page.

Both translator and publisher are to be congratulated on this edition, and we may concisely state our impression of the volume in the words of an old Dutch poet: 'Smaakt naar meer' (We should like more of it).

[What some English students would like to know is whether Roman-Dutch law is bound to Voet as a quasi-sacred and infallible book, or is free to profit by the modern scientific study of Roman law in its original authorities.—F. P.]

Dowell's Income Tax Laws. By J. E. Piper. Fifth Edition. London: Butterworth & Co. 1902. 8vo. lxxx and 474 pp. (14*s.* 6*d.*)

The Income Tax Acts constitute, if we may be allowed a paradoxical expression, an 'uncodified Code'; they form a mass of shapeless legislation which, after being moulded for years by official practice and judicial legislation, contains all the principles governing an important department of revenue law. The authoritative and almost official exposition of income tax law has long been Mr. Dowell's book; for some years it has, we believe, been out of print, but it has now been admirably re-edited by Mr. Piper, Assistant Solicitor of Inland Revenue. The treatise has, indeed, 'been so much enlarged and altered as to practically constitute the present edition a new work.' It retains the sterling merits of Mr. Dowell's volume, and displays new and meritorious features of its own. The introduction, for example, proves occasionally of an interest not often to be found in treatises on revenue law. An historian may note with some amusement the way in which Addington was compelled to remodel his financial measures at the dictation of Pitt, and may learn that one at least of the many obscurities of the Income Tax Acts is due to a desire on the part of Pitt to keep, in name at any rate, the pledge originally given to the fundholder that Government

annuities should be clear of all taxes and duties whatsoever. The introduction further provides the best general sketch with which we are acquainted of income tax law; and whoever wishes for a specimen of the care with which Mr. Piper brings together all the cases on a point of difficulty should study the notes on 'Constructive Remittance' (pp. 158–160). We are in duty bound, however, to warn our readers that on one point Mr. Piper's note will mislead them. The result of the *Gresham Life Assurance Society* v. *Bishop* is exactly the contrary to that which Mr. Piper states it to be, but for this error our author is not to blame. Since the book was published the House of Lords has reversed the decision of the Court of Appeal in *Gresham Life Assurance Society* v. *Bishop* [1901] 1 K.B. 153. Even the acutest of commentators cannot be a prophet, and an official of the Inland Revenue Office could not be expected to perceive that the Scottish Court which decided against the claim of the Crown to tax interest not in fact received in the United Kingdom—*Standard Life Assurance Co.* v. *Allan* [1901] 38 Sc. L. R. 628—had interpreted the Income Tax Acts more correctly than did the English Court of Appeal.

The Law Relating to Trade Unions. By D. R. Chalmers-Hunt. London: Butterworth & Co. 1902. 8vo. xxxiii and 309 pp. (12*s.* 6*d.*)

This book is divided into two portions: one concerned with the discussion of the decisions in the House of Lords in the *Mogul* case, *Allen* v. *Flood* and *Quinn* v. *Leathem*, and the law enunciated in them: the other prints the statutes relating to Trade Unions, with annotations section by section. This latter part is carefully and exhaustively done, and should be of considerable value; since there has been, so far as we are aware, no work of the kind published within the last five and twenty years, during all of which the Courts have been actively engaged in expounding trades union legislation. The earlier portion of the work we cannot praise without great qualifications. Mr. Chalmers-Hunt has undoubtedly taken much pains to acquaint himself with his subject in many aspects. He is argumentative, not to say disputatious, and of an abundant courage. But he is hampered with a style from which he should as quickly as possible release himself if he wishes his books to be read. Here is a specimen sentence (at p. 63).

'It will be seen again that Lord Lindley's theory of conspiracy not only admits the existence of a private right denied in *Allen* v. *Flood*, but takes no account of the doctrine laid down in *Gregory* v. *Duke of Brunswick*, and which in reality seems to have formed the basis or starting-point of the judgments in the *Mogul* case, and that of Lord Macnaghten and others in *Quinn* v. *Leathem*, namely, that (apart from conspiracies to do acts unlawful in themselves, i.e. not depending on the combination for their illegality) a combination having for its immediate object the hurt of another is *prima facie* unlawful, and needs to be justified for reasons recognized and approved by the law; and consistently with this that the combination or concert in the *Mogul* case and the *Fleshers'* case was justifiable *videlicet* on the ground of trade competition.'

The writer of this notice, after having struggled with several pages of sentences cast in the mould of the above quotation, is absolutely unable to say whether the allegation as to Lord Lindley's views is established.

Mr. Chalmers-Hunt is greatly concerned with alleged heresies in law of

Lords Shand and Lindley. To the former he substantially devotes the first eighty pages of his treatise. A reader unacquainted with the course of decisions in the Lords during the past few years would not impossibly imbibe from Part I of this book an opinion that Lord Shand's aggressive and dominating personality was placing in jeopardy cardinal principles of English law, to secure the integrity of which Mr. Chalmers-Hunt is constrained to join battle. Indeed, more pages are devoted to the controverting of views alleged to be his Lordship's than there are lines devoted to the views of the Lord Chancellor, not counting, however, those places where they are introduced in quotations by Lord Shand.

One *dictum* of the Lord Chancellor's, which strangely enough has no necessary connexion with Trades Union law, Mr. Chalmers-Hunt does set out (at p. 41): 'A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to logically follow from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.' This proposition wants thinking about. Sir Edward Coke, it may be observed, was scarcely one of the lawyers in the Chancellor's mind, since he has left on record that 'reason is the life of the law, nay the common law itself is nothing else but reason': Co. Lit. 97 b; nor yet the authors of the Digest, who tell us *non possunt omnes articuli singillatim aut legibus, aut senatus consultis comprehendi; sed cum in aliqua causa sententia eorum manifesta est, is, qui jurisdictioni praest, ad similia procedere, atque ita jus dicere debet* (D. 1, 3, 12); nor yet Chancellor Kent who is very emphatic in a contradictory sense: 'The reports of judicial decisions contain the most certain evidence and the most precise application of the rules of the common law. Adjudged cases become precedents for future cases resting upon analogous facts and brought within the same reasons. . . . A solemn decision upon a point of law arising in any given case becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. . . . The language of Sir William Jones (Bailments 46) is exceedingly forcible on the point. "No man," says he, "who is not a lawyer would ever know how to act; and no man who is a lawyer would, in many instances, know what to advise, unless Courts were bound by authority as firmly as the pagan deities were supposed to be bound by the decrees of fate"' (1 Comm. 473).

Mr. Chalmers-Hunt twice speaks of the 'late Lord Field' and once of the 'late Mr. Justice North.' Perhaps Sir Ford North may rightly be thus designated, but the adjective is inappropriate when prefixed to Lord Field. The binding, type, paper and general presentment of the book leave nothing to be desired.

The Workmen's Compensation Acts, 1897 & 1900. By Albert Parsons and Anton Bertram. Second Edition. London: William Clowes & Sons, Lim. 1902. 8vo. xxvii and 215 pp. (*7s. 6d.*)

Students of Workmen's Compensation cannot complain of lack of treatises in which they may study their subject. We have actually counted up to a dozen attempts to make plain the paths of knowledge herein. Amongst these, for laborious fulness of information, knowledge,

and acumen, Messrs. Parsons and Bertram's book takes a very high rank indeed. Not that it is a wholly satisfactory book—the subject and the phase of development of the doctrines upon it forbid that to be hoped for yet. Still we heartily commend the book as well suited for the needs of the practitioner. The method of treatment adopted—that of a comment paragraph by paragraph—prevents any adequate general view of the subject, and the reader has to turn backwards and forwards in a distracting manner to gain what information is to be got on any inquiry he may be pursuing. To give an example: the decision of the House of Lords in *Cooper and Crane* v. *Wright*, given since the publication of this book, overrules the Court of Appeal decision of *Cass* v. *Butler* [1900] 1 Q. B. 77. Turning then to ascertain our authors' view of this decision, we find it commented on in their Introduction (p. xi). There we are passed on to p. 22, where are some very acute and incisive criticisms. Then we have to travel to p. 26; and if we wish to learn all the authors have to tell us on the subject (and what they have to say is much to the point) we must journey forward to p. 63. Or, again, should we wish to hear what our authors have to say on the subject of a 'ship in dock,' we must make a triple journey. We set out at p. 36; we then tack to p. 48, and have to beat back to the 'Introduction, pp. vii et seq.' before we learn all there is to be taught us. It is true that Messrs. Parsons and Bertram have precedent for their method of treatment, from Sir Edward Coke down to ten out of their twelve rivals; still the method adopted is not satisfactory, and we wonder that the manifest ability of the authors did not spur them to a bolder and more comprehensive method of treatment.

The collection, at the commencement of the Introduction, of the vituperative and splenetic utterances of judges upon the drafting of the Act is curious if not edifying. It is, however, doubtful whether there would be less criticism or litigation were we to revert to the method, under the Plantagenets, of delegating the drafting of statutes to His Majesty's judges. Possibly even then there would be judicial inquietude. Or it might happen that adjectives like 'grotesque,' 'ridiculous,' 'absurd,' would be handed on for use by those critics who will always be with us—the text-writers—and impartially distributed between the drafting and the decisions.

The legislation and not the drafting seems to us in the main to blame. The Workmen's Compensation Act is a new piece of very diverse stuff in the old garment of our common law which ravels much at the seam. It introduces new principles and methods, and applies them to concerns national in their extent. The Act, which is printed in ten or a dozen pages of the ordinary edition of the Statutes, deals with many industries, the coal, iron, and railway enterprises of the country, which may even singly be compared with those dealt with by the Merchant Shipping Act 1894, which takes up some three hundred pages of the same edition. It comes counter to prejudices. It requires a reversal of ingrained habits of thought. Moreover, the conflicting interests it deals with insist on a judicial decision before acquiescing in a new rule of liability. And after all, does not the fault lie more with the judges than with the drafting? Here is a sample. A 'scaffolding' seems a term susceptible of definition in accordance with common sense and every-day knowledge. Yet one learned member of the Court of Appeal tells us that a ladder 'resting on the ground' is a scaffolding; and another that it is not; 'for this Court has already held' so; and nothing more! *Veazey* v. *Chattle* [1902] 1 K. B. 494.

Messrs. Parsons and Bertram are not always accurate. For example,

at p. 10 they say, 'the question of serious and wilful misconduct is in every case a question of fact.' This is plainly not so. The phrase is one that requires definition; and definition is the duty of the judge. With the bane Messrs. Parsons and Bertram however supply the antidote, and the true principle is laid down by the present Master of the Rolls in the cases they refer to of *Fenn* v. *Miller* and *Ferguson* v. *Green*. Their own note, moreover, indicates the right rule. The difficulty in all these questions is the old and inevitable one when dealing with mixed questions of law and fact.

At p. 8 we are told that 'the Employer under the Employers' Liability Act is responsible to the same extent as he would have been at common law, if the person in question had not been in his service.' Of course this is not so: and at the bottom of the same page the authors refer to sec. 3 of the Employers' Liability Act and state the correct rule. But a sentence of the kind may be seriously misleading.

Again, some of the Scottish decisions look strange to English eyes, even in the most accurate of reports. This should be a reason for greater care in their reproduction. *Reid* v. *Fleming* (at p. 58) in the report is a very different case from what it appears in the note. 'A hay-cutting machine in course of construction was being tested by machinery driven by steam' is scarcely a fair summary of facts showing that engineers had sold a hay-cutter, had undertaken to fit it up and have it in working order in their customer's premises, and that it was necessary to test it as the work proceeded. *Cunningham* v. *M'Gregor* (at p. 69), again, merely states that the deceased husband had not contributed to the support of the wife, from whom he had been separated for three years preceding his death, more than £5 per annum. It leaves out the very material circumstances that the main means of support of the wife, whose earnings were only precarious and occasional, were charitable contributions. Yet these omitted facts bring the case within the principle of *Pryce* v. *Penrikyber Navigation Co.* [1902] 1 K. B. 221. We trust that a similar omission of relevant facts may explain the Scottish decision in *Cooper* v. *M'Govern* (Addendum, xxviii) where the Court of Session are represented to have held a railway company's carter conveying sausages from a sausage factory to the railway station for transit to be engaged in work which is a 'part of or process in' sausage-making. Surely the difficulty here is not through bad drafting of the Act. This fault of inaccurate statement is not confined to the notes of Scottish cases. *Douglas* v. *The United Minerva Mining Co.* (at p. 6) is an instance of an English case which assumes a wholly wrong appearance from the omission of the facts, that the shaft, from using which the accident arose, 'was habitually used' by the workmen; and that there was 'a recognized custom that they should do so.' On page 40, within half a dozen lines, the name of a case is spelled in different ways. There are similar inaccuracies, in themselves absolutely trivial, on the next page, still indicating lack of exact accuracy.

The effect of the factory legislation in extending the operation of the Workmen's Compensation Act is traced very carefully and minutely. The note on 'The Claim for Compensation' (p. 17) gives in brief some just notion of the care, labour, and acumen that is bestowed on the book. But the absence of literary flavour, or even arrangement, is very noticeable and strange, bearing in mind the acquirements of the authors. The binding does not seem to have been done with a view to any extensive use of the book. Our copy has fallen to pieces through the turning of the pages in preparing this notice.

The Poor Law Statutes. By JAMES BROOK LITTLE. London: Shaw & Sons, and Butterworth & Co. Vol. III. 1902. 8vo. lxvii and 1173 pp. (3 vols., £4 10*s*.)

THIS is the last volume of the collection of Poor Law Statutes from 43 Elizabeth to the end of the reign of Queen Victoria, edited by Mr. Brook Little. We have already noticed Vols. I and II.

This volume contains, in addition to the Acts from 1877 to 1901, a very ample index and table of cases for the whole work. The notes are not quite so full as in the earlier volumes, but seem to be sufficient. If the annotator once begins on such an Act as the Local Government Act, 1894, it is difficult to know where to stop, and Mr. Brook Little has exercised a wise discretion in keeping his notes within the smallest possible compass, confining himself practically to cross references and notices of the few cases decided on the Act.

In some of the earlier Acts a good deal of printing might have been saved, with advantage to the reader as well as the publishers, if the portions repealed by the Statute Law Revision Acts had been omitted. This has been done in some instances, but not in others; see, e. g. the Local Taxation Returns Act, 1877.

Mr. Brook Little is to be congratulated on having brought to a successful conclusion his arduous task of editing, annotating and indexing the large number of statutes contained in these three volumes.

Trattato di Diritto Marittimo. By UMBERTO PIPIA, Professor of Commercial Maritime Law at the University of Genoa, and Member of the 'Comité Maritime International.' Two Volumes. Milan, 1900. Price 31 lire.

PROFESSOR PIPIA'S work is worthy of his reputation, being marked throughout by thoroughness, largeness of view, minute accuracy of detail, and the spirit of considerate reform. In a compendious introduction he sketches the history of maritime law from the *Lex Rhodia de jactu* to the latest modern codes, distinguishing as its special characteristic that tendency towards uniformity and universality which he himself has done so much to forward. He refers, with approval, to the work of the Association for the Reform and Codification of the Law of Nations, and the Comité Maritime International, of which he is a member, and throughout his book loses no opportunity of emphasizing the necessity of an international maritime code. He regrets, and one sympathizes with his regret, that his country, once a glorious pioneer, should in its latest legislation have been guilty of *un deplorevole anacronismo* in its treatment of maritime law. The Professor divides his subject into seven books. In the first he treats of the ship itself, its legal nature, its component parts, the contract of construction, its personality, if one may use the phrase, its ownership, including the various methods of alienation, voluntary and forced, its equipment, its responsibilities and liabilities. In the second he deals with persons, in the third with the contract of carriage, in the fourth with average and insurance, in the fifth with loans, privileges, and bottomry bonds, in the sixth with salvage, and in the seventh with actions.

It may be doubted, at the outset, whether the Professor's division of his subject into persons and things, however theoretically correct, is in practice the most convenient method to adopt, still we propose to follow it.

An Italian ship is divided into twenty-four parts, and its nationality determined by the status of its owner. Residence for a period of at least five years entitles foreigners to the privileges of Italian citizens in this respect, and companies whose principal place of business is abroad are allowed to own Italian ships, if they have among their members an Italian citizen jointly liable with the company. Foreign companies whose principal place of business is in Italy stand on the same footing as resident foreigners. Non-resident foreigners are limited to a third share, and if they become owners of more, the excess must be transferred within a year to someone capable of ownership, otherwise it will be sold by order of the court, and the proceeds, less the cost of sale, be deposited on behalf of whom it may concern. In every case it is patriotically provided that two-thirds of the crew must be Italian.

The captain has no authority to sell his ship, unless it has been expressly given, or the ship is incapable of proceeding on its voyage. What constitutes such incapacity (*innavigabilità*) is a question of fact, but in insurance cases, if the cost of the necessary repairs exceeds three-fourths of the insured value, the ship is deemed incapable of proceeding. If the sale takes place abroad, a declaration before a consul is a necessary formality, and if it is not complied with, the owner can follow the ship into the hands of subsequent purchasers. The contract of sale must, in all cases, be in writing, and endorsed on the Act of Nationality which the ship is compelled to carry among its papers. If the sale takes place abroad, provided it is registered before a consul, the law of the place prevails, but if a foreign ship is sold in Italy, national courtesy allows the *lex rei sitae* to prevail.

Interesting complications may arise from the sequestration of a foreign ship in Italian waters. Sequestration is not an act of execution, but is the immediate precursor of it. Attachment (*pignoramento*) follows in due course. No ship can be arrested on the eve of sailing, nor can a foreign ship where the dispute concerning it is one for the settlement of which Italian law looks to consular authority. But there seems to be some doubt whether a foreign ship which has put into an Italian port of refuge is subject to arrest. Professor Pipia is strongly of opinion that it is not, and his arguments are certainly convincing, although Article 88 of the Codice di Commercio and Article 36 of the Codice per la Marina Mercantile are against him. The law is silent on the question of the sequestration of goods on board a ship ready to sail, but it would seem that by endorsement on the bill of lading an effective lien can be obtained. In all cases of arrest the formalities prescribed by law must be strictly complied with under pain of nullity.

The chapter on Collision (*urto fra navi*, §§ 236–344) is full of information, and one or two points may be noted. The maxim 'quando culpa praecessit casum, tunc casus fortuitus non excusat' neatly expresses the underlying principle of law. In collisions between tug or tow and a third vessel, Professor Pipia expresses himself in favour of the American rather than the English principle, namely, that where the command is, there the responsibility should lie, and quotes Articles 931 and 197 of the Code of Mercantile Marine in his support. He questions the validity in towing contracts of clauses exempting the tug from liability for negligence of officers or crew, and in the matter of compulsory pilotage deplores what he describes as the 'irrimediabile antinomia della legge,' but is inclined to think that it was intended that the pilot should be subordinated to the captain, and that his mere presence on board does not relieve the owner from liability. He is supported in his opinion by the fact that almost all

nations, except England and Germany, take the same view. For ourselves we prefer even the irremediable antinomy of Italian law to the elaborate regulations of certain South American codes, which provide that if there is a difference of opinion between the pilot and the captain, it is the duty of the pilot to call the officers of the ship together and expound his views, and, having expounded them, to note a protest in the log and then obey the captain with what grace he can. One pictures a Chilian pilot expounding his views with heat of controversy to an Argentine captain on the eve of a collision, but one would prefer not to be on board.

In the second book the rights of the shipowner and the limits of his responsibility are fully discussed, and the defects of the various systems pointed out, Professor Pipia being in favour of limiting the owner's personal liability to the net value of the ship. An Italian captain has to mind his *p's* and *q's*. According to the practical Targa he ought to be 'perito, provvido, prudente, provetto, pacifico, pronto, poderoso, e prodigo.' A distinction is drawn between captains *di lungo corso* who can command a ship wherever bound, captains *di gran cabottaggio* who are confined to Europe and certain ports of Africa and India, *padroni* who may not venture outside the Mediterranean, and *marinai* or masters of small coasting vessels.

The third book deals with the contract of affreightment under the three heads of *il contratto di noleggio*, charter-party, *sub-noleggio*, sub-charter, and *polizze di carico*, bills of lading. A time charter, *contratto d'imbrago*, amounts to *locatio navis per aversionem*, and is in law equivalent to a demise of the ship. The English form of charter-party is in general use, and when there is a variance between the bill of lading and the charter-party, the former in the absence of express agreement must be taken to prevail. The law applicable to the interpretation of the contract is the law of the place at which it is made or is to be performed. In all matters of form or proof the rule is *locus regit actum*. A general ship is said to be loaded *a colletta* on the berth, and a correct statement of its tonnage is an essential term of the contract of affreightment. Contrary to the usual practice, freight, *nolo*, begins to run from the day on which loading begins, instead of from the day on which the ship sails, an innovation made apparently with no very definite object by a Commission of the Senate in 1880. It becomes due when the unloading of the cargo is complete. The captain has no lien, *jus retentionis*, for freight. All that he can do is to protest the cargo, and get an order from the court within three days of landing it. If goods are stowed on deck, freight may be deducted. Italian like other continental bills of lading are conclusive evidence of the statements contained in them, except when they relate to the quality of unexamined goods. They are drawn in sets of three or four, according to statutory forms, of which Professor Pipia does not approve, and pass, not the property but the possession and power to dispose of goods, *disponibilità*, upon delivery or endorsement. They must be signed within twenty-four hours of the completion of loading, and if pledged the pledge should be in writing. In cases of disagreement, the captain's copy is accepted. Through bills of lading, *polizze del trasbordo*, render the first carrier responsible, but any carrier may be sued upon them subject to his rights against the others. (The *Maria P.*, Supreme Court of Naples.) The vexed question of negligence clauses is carefully considered, but opposing views are put so impartially forward that one is left in some doubt as to what the law upon the subject really is.

Perhaps the most interesting part of Professor Pipia's work is the

fourth book. Average and insurance are essentially Italian in their origin, and the treatment of them is lucid and exhaustive. Particularly interesting is the comparison of the laws of different countries on the subject of General Average in § 1084, and the question of the expenses caused by deviation. It is to be regretted that the framers of the Italian Code should have made a long and unnecessary catalogue of what constitutes general and particular average, instead of grouping the former systematically, and regarding all matters not included in it as the subject of the latter, but as the Professor justly, and not infrequently remarks, *la legge è legge*. It is also to be regretted that in dealing with Marine Insurance they should have adopted legislation by reference, instead of putting a matter of so great importance upon a footing of its own. 'Alle assicurazioni contro i rischi della navigazione si applicano le regole stabilite nel titolo decimo quarto del libro primo che non sono incompatibili colle assicurazioni marittime e che non sono modificate colle seguenti disposizioni.'

The chapters on contributing values and interests are admirable, and one is struck by the fact that freight is not included in *la massa creditrice*, and that the ship is valued at one half for the purposes of *la massa contribuente*. In the book which deals with salvage, the distinction between *salvamento* and *assistenza* is noticeable, and the rules by which salvage money is automatically divided among the persons interested are worthy of consideration. A pleasant feature of Italian law is the dower, *colonna* or *dotazione*, of a ship. It consists of a sum varying with the tonnage of the ship, the length of the voyage, and the custom of the port; it is set apart to meet all the necessary expenses of the voyage. It constitutes an insurable interest, and the amount is inscribed on the ship's papers.

The last book deals appropriately with actions, without which the law were *oziosa*. We have no space to consider it in detail, but two points may be noted. First, the disadvantages of a number of independent local courts of co-ordinate jurisdiction. The *Corte di Cassazione* of Genoa, Rome, Florence, Venice, Naples, and Turin, to name a few of them, may all take different and contradictory views of any point of law, and the question arises which view is to prevail. The law thus tends to become local and uncertain, instead of universal and assured. Secondly, the advantages of the Italian system of prescription which seldom exceeds a year, and in many cases is considerably less. This is both practical and reasonable, whereas in England the periods are neither reasonable nor practical, and this branch of the law demands a special study in itself.

State Intervention in English Education. By J. E. G. de Montmorency. Cambridge University Press. 1902. xxxii and 366 pp. (5*s.* net.)

This work contains an interesting account of the Welsh Piety Schools, and of the origin of the Society for promoting Christian Knowledge, the British and Foreign School Society, and the National Society; and of educational efforts in Parliament previous to 1833. The rest of the book consists chiefly of idle inferences from ill-arranged and often misunderstood facts. For instance, a common writ of prohibition taken out of the Registrum Brevium (pp. 16, 31) is treated as evidence of King Edward III's educational policy (p. 188). The confusion of Battle Abbey with Beaulieu (p. 16) is comparatively venial. The author has discovered some curiosities of which one would be glad to hear more: such as *signicavit* (p. 174)

and leaseholders at the will of the lord (p. 24). There is a good simile on p. 107: 'the thirst of the Archbishop for information was the thirst of the Sahara; unlimited, unquenchable, unproductive.' But its relevance is not artistically managed.

We have also received:—

Wharton's Law Lexicon: forming an Epitome of the Law of England; and containing full explanations of technical terms and phrases, &c. Tenth Edition. By J. M. LELY. London: Stevens & Sons, Lim. 1902. La. 8vo. iv and 814 pp. (38*s.*)—We cannot honestly commend Wharton's Law Lexicon in its present form. Indeed we doubt whether any editor could now make a really good book of it. Years ago we gave a hint that the antiquarian articles were uncritical and out of date. They still remain so; and lapse of time has made their offences rather worse. Nor can we say anything better of the attempts at scientific definition. To take a subject of very recent interest: '*Martial Law*, that rule of action which is imposed by the military power.' It would be difficult to invent anything less apt. In fact Mr. Lely's editorial work has been confined, or almost confined, to adding short comments on recent statutes and decisions. These additions, though often meagre, may certainly be useful; but it is a serious drawback to their utility that they are mixed up with so much that is useless or absolutely wrong.

The History of the Legislation concerning Real and Personal Property in England during the reign of Queen Victoria. By J. E. R. DE VILLIERS. (Yorke Prize Essay, 1900.) London: C. J. Clay & Sons. 1901. 8vo. xix and 236 pp. (3*s.* 6*d.*)—This is a meritorious prize essay, founded on conscientious study of the reports of the Real Property Commissioners, and other parliamentary papers and original documents. But it cannot be recommended to beginners in legal history, as it assumes a general knowledge of law which they are not likely to possess; nor is it full enough to be of much assistance to more advanced students engaged in special research, though it may furnish them with some useful references. We think Mr. de Villiers would have done better to re-write and enlarge the essay at leisure, instead of making haste to publish it as it stood. It is curious to find no mention of the Bern Convention under the head of Copyright; and it is also curious that the 'One-man Company' decision of the House of Lords (which, amongst other effects, has made it quite needless to talk, as the author still does, of introducing commandite partnership) has wholly escaped attention. Mr. de Villiers has learnt nearly all that can be learnt from books. He still has to learn from practice, and doubtless will.

Questions and Answers from the Justice of the Peace connected with Local Government, Public Health, Poor Law, Poor Rate, Licensing, and the general duties of Magistrates . . covering the twenty years 1877–1896. Revised and modified as rendered necessary by subsequent legislation and decisions. Edited by C. E. ALLEN, assisted by H. G. CALTHROP, M. CAMPBELL-JOHNSTON, F. J. COLTMAN, Q. E. DYER, T. FRANCIS HOWELL, W. E. LLOYD, and J. C. SWINBURNE-HANHAM. London: Office of the 'Justice of the Peace'; Shaw & Sons; Butterworth & Co. 1902. 4to. xl and 1146 pp.

The Factory Acts. By the late ALEXANDER REDGRAVE, C.B. Ninth Edition. By H. S. SCRIVENER and C. F. LLOYD. Statutory Orders,

Special Rules and Forms revised by W. PEACOCK. London: Shaw & Sons; Butterworth & Co. 1902. 8vo. lvi, 370 and 54 pp. (*7s. 6d.*)

The Revised Reports. Edited by Sir F. POLLOCK, assisted by O. A. SAUNDERS and ARTHUR B. CANE. Vol. LV. 1840–1842. (4 Beavan; 1 Queen's Bench; 1 Gale & Davison; 6 Meeson & Welsby; 3 Jurist.) London: Sweet & Maxwell, Lim.; Boston, Mass.: Little, Brown & Co. 1902. La. 8vo. xiii and 846 pp.

A Treatise on the Law of Companies considered as a branch of the Law of Partnership. By the Right Hon. LORD LINDLEY. Sixth Edition. By the Hon. WALTER B. LINDLEY. Two Volumes. London: Sweet & Maxwell, Lim. 1902. La. 8vo. ccv and 1906 pp. (£3 10*s.*)—Review will follow.

The Law specially relating to Tramways and Light Railways . . . with a full collection of Precedents. By SEWARD BRICE, K.C. Second Edition. By the Author and B. J. LEVERSON. London: Stevens & Haynes. 1902. 8vo. xlii and 551 pp. (18*s.* net.)

Statutes of Practical Utility passed in 1895–1901. Arranged in continuation of the fifth edition of Chitty's Statutes (Vol. 14, Supplement), with notes, &c. By J. M. LELY. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1902. La. 8vo. xx and 1029 pp. (42*s.*)

A Treatise on the Law of Master and Servant, &c. By CHARLES MANLEY SMITH. Fifth Edition. By ERNEST MANLEY SMITH. London: Sweet & Maxwell, Lim. 1902. 8vo. xcviii and 823 pp. (28*s.*)

The Law relating to Building Societies. By E. A. WURTZBURG. Fourth Edition. London: Stevens & Sons, Lim. 1902. 8vo. xxiv, 513 and 40 pp. (16*s.*)

Pleas of the Crown for the Hundred of Swineshead and the Township of Bristol . . , A.D. 1221. By EDWARD JAMES WATSON. Bristol: W. Crofton Hemmons. 1902. La. 8vo. 174 pp.

Jurisprudence or the Theory of Law. By JOHN W. SALMOND. London: Stevens & Haynes. 1902. 8vo. xv and 673 pp. (18*s.* net.)—Review will follow.

Captazione. By MARIO SARFATTI (estratto dalla Enciclopedia Giuridica Italiana). Milano: Società Editrice Libraria. 1902. 8vo. 38 pp.

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The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.

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NOTES.

WHEN *Farquharson Bros. & Co.* v. *King & Co.* was reported in the Court of Appeal we expressed, with natural diffidence, a preference for the view of Stirling L.J. and Mathew J., as he then was, as against that of the majority of the Court: L. Q. R. xvii. 347. The House of Lords has now unanimously and emphatically reversed the judgment of the C. A., and justified its dissenting member and the judge who first tried the cause: [1902] A. C. 325, 71 L. J. K. B. 667. The true owners of the timber in question did not hold out their fraudulent clerk, Capon, to the purchasers as authorized to dispose of it, for the purchasers never knew of his existence; therefore there could be no estoppel on the ground of apparent authority. The only other argument for the purchasers was that the owners had enabled, or as Mr. Ewart would say assisted, Capon to procure delivery of the goods by orders in favour of and purporting to be indorsed by a fictitious person. But every man who is put in a position of trust is thereby enabled to abuse it if he is dishonest. There can be no trust without power, and no power without some risk of abuse. 'In that sense, every one who has a servant enables him to steal whatever is within his reach' (Lord Lindley [1902] A. C. at p. 342). As between the plaintiffs and the defendants, the case was really the same as if Capon had stolen the timber from the warehouse and delivered it to the defendants for value but not in market overt.

What Capon actually did was to put the timber into the name of an imaginary Brown, to deal with the defendants in the name of this Brown, and by forged indorsements in that name to procure the dock company who held the timber, and had instructions from the owners to act on Capon's delivery orders, to deliver as it were *brevi manu* to the defendants.

Thus Capon, whether with conscious ingenuity or not, avoided the commission of any trespass, much more of larceny. There was

no trespass by him, though there was a fraudulent conversion: he assumed dominion of the goods, but there was never a moment when he took possession. There was no constructive delivery to him, for the dock company never assented to hold the goods on his account. If they did assent for any assignable time (which is not clear) to hold for the fictitious Brown, any such assent was inoperative. Nor was there any trespass on the part of the purchasers, though there was a conversion; for they received delivery from a lawful possessor, the dock company, with the intent with which it was given. All this, it is humbly conceived, is not only certain but elementary. That being so, it seems unfortunate that such terms as theft and stealing were used in a loose manner in the judgments of more than one of the noble and learned lords, and that the Lord Chancellor should actually have gone out of his way to say that Capon did steal the goods, [1902] A.C. at p. 329: a dictum which, unless it can be reduced to a rhetorical way of saying that he had no more title or power of giving title than a thief, was wholly unnecessary and extra-judicial. We are far from asserting that the definition of larceny at common law is reasonable, though there was something to be said for its narrowness when all felonies were capital. But it is too late now for even the House of Lords to alter it judicially. 'The man who steals is a servant: his possession is the possession of his master.' So Lord Halsbury. Generally, according to the law we have learnt, a servant intrusted with goods has custody but not possession; if he converts the goods to his own use *animo furandi* he determines the master's possession and acquires a wrongful possession of his own. Here Capon, if we read the facts rightly, never had either custody or possession of any kind. It seems extremely doubtful whether a constructive delivery of goods by a bailee, without any physical transfer, and whether on the face of it within the bailee's authority from the bailor or not, can in any case be equivalent to asportation within the definition of larceny at common law. That question, it is submitted, was not raised by the facts of the present case.

The drafting of the Workmen's Compensation Act continues to be severely criticized in the House of Lords. Lord Robertson says its enactments are 'incoherent and almost contradictory.' Lord Brampton says it is 'so framed as to provoke rather than minimize litigation': *Cooper & Crane* v. *Wright* [1902] A. C. at pp. 306, 308. We suppose it is useless, in the present state of our legislative procedure, to express a modest hope that an amending Bill may be brought in by the Government next session.

We learn from the judgment of the Judicial Committee in *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.* [1902] A. C. 381, that the rule of *Fletcher* v. *Rylands*, L. R. 3 H. L. 330, as to the absolute liability of a person creating danger to his neighbours or the public by 'non-natural' uses of his land, is part of the Roman-Dutch law received in Cape Colony, though their Lordships did not hold it applicable in the case before them. The connexion with any ground of liability recognized in the classical Roman law does not seem obvious at first sight. We can only guess that the rule may be taken as an extension of the liability *quasi ex delicto* enforced by the action *positi aut suspensi*. Yet we had thought that liability *quasi ex delicto* assumed the existence of *culpa* somewhere, though not necessarily in the defendant. Now this is exactly what the rule in *Fletcher* v. *Rylands* does not. The judgment gives a hint that their Lordships were aware of this; but we should have liked a more distinct exposition.

X is a director of, and a shareholder in, a company *N. & Co.*, which he finances. *A* obtains a judgment against the company and issues execution upon it. Execution is stayed because *X* promises *A* orally to indorse bills for the amount of the debt. *X* does not keep his promise. The question arises, Is *X*'s promise a 'promise to answer for the debt of another' within the Statute of Frauds (29 Car. II, c. 3), s. 4? The Court of Appeal, reversing the judgment of Mathew J., hold that it is not such a promise, and that therefore, though the promise is made by word of mouth, *X* is liable to an action for the breach thereof: *Harburg India Rubber Comb Co.* v. *Martin* [1902] 1 K. B. 778, 71 L. J. K. B. 529, C. A. The importance of the case lies in the fact that the Court laid down with distinctness principles for determining whether a promise is or is not a 'promise to answer for the debt of another' within s. 4. These principles may be thus summed up:

(1) A promise does not come within the scope of s. 4 at all if it is a promise of indemnity and not of guaranty, or in other words, if it is not a promise to *A* to answer for the possible default of *N*, but is a direct promise to *A* to keep him indemnified against a certain liability independently of the question whether *N* makes default or not. Compare *Guild & Co.* v. *Conrad* [1894] 2 Q. B. 885, 896, judgment of Davey L. J.

(2) A promise which would otherwise be 'a promise to answer for the debt of another' is taken out of s. 4, and is therefore enforceable though merely made orally, if the promise is a part of a larger contract (e. g. a contract involving the transfer of property)

made with an object beyond that of guaranteeing by *X* to *A* the performance of a promise by *N*: *Harburg India Rubber Comb Co.* v. *Martin* [1902] 1 K. B. 778, 786, judgment of Vaughan Williams L. J.

Few critics will doubt that the result arrived at in *Harburg India Rubber Comb Co.* v. *Martin* by the C. A. is right and that the distinctions drawn by the Court are at once subtle and instructive, but they suggest an obvious reflection. Is there any substantial reason why the liability of a defendant to perform a promise which he has made for good consideration should depend upon the real though refined distinctions insisted upon by the C. A.? Is it reasonable that *X* should be able to defraud *A* because *X* can show that his promise to *A* was a promise of guaranty, and not a promise of indemnity? Would honest men suffer if the fourth section of the Statute of Frauds were repealed? The decisions as to what amounts to a sufficient 'note or memorandum' within this section —applicable to all cases within the section, though mostly given on contracts for the sale of land — also run into very fine distinctions.

The story runs that a former Speaker of the House, at some Parliamentary crisis, whispered the Clerk of the House for advice: 'Be very careful how you act' came the cautious answer. It was not particularly useful advice, but it is the sort of guidance which we have to be satisfied with sometimes in the sphinx-like utterances of our Courts. For instance, the House of Lords in *Dovey* v. *Cory*, [1901] A. C. 477, 70 L. J. Ch. 753, passed a number of damaging criticisms on the decisions of the Court of Appeal in *Lee* v. *Neuchatel Asphalte Co.*, 41 Ch. D. 1, 58 L. J. Ch. 408, and *Verner* v. *General Commercial Trust* [1894] 2 Ch. 239, 63 L. J. Ch. 456, in regard to the payment of dividends by a company after a loss of capital, while failing to point out any more excellent way to the perplexed director. Yet the issue is a simple one. Take the case, for instance, put by Lord Halsbury of a shipping company having two of its vessels sunk uninsured. Is it competent to the company to ignore the loss and to go on paying dividends on the earnings of its remaining fleet, or must it first replace the lost capital? If it must replace the loss, that means a stoppage of dividends for many years, possibly ruin to the company. This was what the Court of Appeal was pressed by in deciding as it did, and Lord Halsbury has recognized the force of the argument, but was it not to meet this very difficulty that the Company Acts, 1867 and 1877, were passed—to furnish a company with the means of writing off, with the sanction

of the Court, capital so lost and going on trading with its diminished assets? Is it any hardship to hold that unless a company takes this course it must replace the loss out of profits before applying them in dividends? This is what every company conducted on sound principles in fact does—it sets apart a portion of its earnings for depreciation of its undertaking or permanent plant. The Companies Acts are mainly resorted to now, not so much to relieve a company from this obligation as to accomplish a financial juggle—to enable a company to hold itself out as more prosperous than it really is by turning what would be a small dividend on its original capital into a large dividend on its reduced capital. See the latest application of the authorities by Farwell J. in *Bond* v. *Barrow Haematite Steel Co.* [1902] 1 Ch. 353, 71 L. J. Ch. 246.

It is one of the sorrows of directors that while their liabilities are certain, their remuneration is precarious. It was at one time doubtful whether they had any claim at all to recover remuneration appointed to be paid them by the articles, for articles constitute no contract between the company and an employee named in them, and are at most only an authority by the shareholders to the directors to pay themselves the remuneration reserved; but in *Swabey* v. *Port Darwin Gold Mining Co.*, 1 Meg. C. R. 385, the Court extricated itself ingeniously from the difficulty. The articles, it said, are not in themselves a contract, but they constitute an offer by the company to the directors to serve it on certain terms, and when that offer is accepted and acted on the directors can sue the company for what is due to them. If directors' remuneration is not in this or some other way a debt, they cannot prove for it in the winding-up. Another risk has lately discovered itself. Directors' remuneration is not primâ facie apportionable, so that if a director has not completed his year of service when a winding-up commences he loses his right altogether (*Salton* v. *New Beeston Cycle Co.* [1899] 1 Ch. 775; *Inman* v. *Acroyd*, 82 L. T. R. 631). This is a hardship, and the draftsman of the articles in *Caridad Copper Mining Co.* v. *Swallow* [1902] 2 K. B. 44, 71 L. J. K. B. 601, C. A., thinking to redress it, provided that the director's salary of £200 a year there was 'to be paid at such times as the directors may determine,' so that if a winding-up was imminent the directors could vote themselves an amount of remuneration proportionate to their term of service. Now the Court of Appeal have held that these words create a condition precedent, and directors' position is again rendered one of insecurity, for who can say when a winding-up may commence, when a creditor may be minded to present a winding-up petition?

'It is sometimes difficult to say whether a particular thing is a wrong or a breach of contract': *Sachs* v. *Henderson* [1902] 1 K. B. 612, 616, 71 L. J. K. B. 392, C. A., per Collins M. R. This speculative puzzle, which used under the old system of pleading to possess an importance it has now lost (*Alton* v. *Midland Ry. Co.*, 19 C. B. N. S. 213), occasionally reappears as a sort of survival in connexion with the right to costs in so far as it depends on the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116. It is worth noting that a problem which still perplexes the Courts is due to two different causes: the one is that for technical reasons the older pleaders used often to represent what was really a breach of contract under the form of a tort and thus created the anomaly of a tort founded on a contract (see Dicey, Parties to an Action, p. 16). The other is that though a tort is in reality an infringement of a common law right which is not a breach of contract, yet it may well happen that the relation between the parties which renders it possible for a particular tort to be committed may itself be created by a contract. This is the case in many actions brought against a bailee: *Turner* v. *Stallibrass* [1898] 1 Q. B. 56, 67 L. J. Q. B. 52, C. A. What that case and *Sachs* v. *Henderson* in effect decide is that in determining whether an action is founded on contract or on tort, at any rate for the purpose of determining the plaintiff's right to costs, the Court must look to the substance of the matter, and must treat an action as grounded on tort whenever it does not arise from a direct breach of a contract, and that this is so even though the duty for the breach of which the action is brought arises from some antecedent consensual relation between the parties. The historical irony of the matter is that there is no kind of foundation for the assumption that every personal action is either in contract or in tort: see Prof. Maitland's appendix to Pollock on Torts.

Many a legal novice has wondered why the word 'demise' should have the mysterious efficacy attached to it of carrying an implied covenant by the lessor for quiet possession. If *Budd-Scott* v. *Daniel* [1902] 2 K. B. 351, 71 L. J. K. B. 706, is correct there is no mystery at all about the matter—any commonplace word will do as well as 'demise,' 'let,' for instance, or 'agree to let': any term in fact sufficient to create the relation of landlord and tenant. It required some courage for the Divisional Court to arrive at such a conclusion in the face of the considered judgment of the Court of Appeal delivered by Kay L. J. in *Baynes* v. *Lloyd* [1895] 2 Q. B. 601, 64 L. J. Q. B. 787; indeed it is obvious that this method of construction, if persevered in, would reduce the law of England to

mere common sense. In not accepting the well-meant desire of the Court to rationalize our law there is this consideration to be borne in mind, that implied covenants are not to be encouraged, especially when they imply more than an ordinary person would possibly imagine he was covenanting for. One of the pupil's first lessons in conveyancing is to exclude the wider implied covenant by an express covenant in qualified terms. It is true that the Conveyancing Acts, 1881, have adopted this principle of implying covenants, but only in matters of common form. The mischief of going further is well illustrated in a recent Conveyancing Act of New Zealand, where a general covenant by a lessee to repair is implied from the letting. The clearest statement of the law as now understood by the Divisional Court will be found in the judgment of Channell J. A remark in the judgment of Darling J. (at pp. 359-360) seems to ignore the history of the word *firma*.

The intention of the Settled Land Act was to enable a tenant for life to do for the estate as a whole that which a prudent tenant in fee simple would do, and the beneficial effect of the Act is not to be frustrated by a minutely literal construction of its powers and provisions. This, broadly speaking, was the view enforced by the Court of Appeal in *Re Aldam's Settled Estate* [1902] 2 Ch. 46, 71 L. J. Ch. 552, where an application to sanction a mining lease by a tenant for life, the terms of which were usual in the district and not seriously alleged to be improvident or unreasonable, had been refused by the Court below on grounds savouring of a presumption that the Act was to be construed as a kind of penal statute against remaindermen. We believe the decision of the C. A. will be welcome both to landowners and to conveyancers.

The mistake made by the defendant in *Van Praagh* v. *Everidge* [1902] 2 Ch. 266, 71 L. J. Ch. 598, is not one to cause any surprise. A deaf builder goes to an auction meaning to bid for a particular property—a building estate in Kent—which is being offered for sale, and owing to inattention to the auctioneer's remarks, and absorption in his own plans, bids for a residential property in Hampstead, under the impression that he is bidding for the building estate, and it is knocked down to him accordingly. In such a case of pure mistake is the owner of the property sold entitled to specific performance—as distinguished from damages—against the purchaser? Kekewich J. has held that he is. It may be thought a strong decision, and hardly supported by *Tamplin* v. *James*, 15 Ch. D. 215. In that case what was bought was an inn

and a shop, and the purchaser's mistake was in thinking that two pieces of garden ground at the back were included in the property. It was not a case of buying Blackacre in mistake for Whiteacre, and even in that case the Lords Justices qualify the judgment for specific performance, as Kay J. also does in *Goddard* v. *Jeffreys*, 51 L. J. Ch. 57, by saying that specific performance will not be ordered if to hold the purchaser to his bargain would be unreasonable and a hardship on him amounting to injustice. Yet what hardship can be greater than forcing a man to take and pay for a property which he had not the remotest intention of buying, and which is utterly unlike the property which he wanted to buy and useless to him, especially when the mistake has been contributed to if not caused by a natural infirmity like deafness? For such a mistake damages seem the proper penalty, and quite penalty enough, covering as they do the expenses of sale as well as estimated depreciation in the property. Mistake of fact is not the less a ground of relief because the person who has made the mistake had the means of knowledge (*Willmott* v. *Barber*, 15 Ch. D. 96). On the other hand it may be said that, if a deaf man will attend an auction in person, it is his business and not the seller's to take special precautions; and that the Courts do not really treat specific performance, at this day, as an extraordinary remedy.

That a person may 'hold shares in his own right' without any beneficial interest in them is no doubt correct as an abstract proposition. It was the view of Jessel M. R. in *Pulbrook* v. *Richmond*, and of Lindley L. J. in *Bambridge* v. *Smith*, 41 Ch. D. 462, but when the words are used in reference to a director's share qualification, such a construction comes near to 'sticking in the bark,' for it is of the very essence of such a qualification that the director should have a real stake in the fortunes of the company, not a barren trusteeship which is no incentive to him to be loyal to the company and do his best for its interests.

To satisfy the words 'holding in his own right,' the director must, however, hold them in such a way that the company can safely deal with him in respect of his shares, and Buckley J. had to consider the meaning of this in *Sutton* v. *English and Colonial Produce Co.* [1902] 2 Ch. 502, 71 L. J. Ch. 685. There a director had become bankrupt and the trustee in bankruptcy had served notice on the company claiming under one of the company's articles to be registered as holder of the bankrupt's qualification shares, though he had afterwards by telegram to the company postponed deciding whether he would register himself or sell. After this notice Buckley J.

held that the bankrupt could not claim to 'hold in his own right'—to have the dominion of the shares—and was disqualified from acting as a director. It would no doubt be inconvenient to insist in articles that a director must have for his qualification the beneficial as well as the legal ownership in his qualification. So to require would prevent a director mortgaging or charging his interest: but a share qualification minus the beneficial interest in the shares is a mere sham imposing on shareholders with a false security.

The *donatio mortis causâ* affords equity good opportunity for its traditional love of hairsplitting, as may be seen from *In Re Andrews, Andrews* v. *Andrews* [1902] 2 Ch. 394, 71 L. J. Ch. 676. There a person, not expecting to recover, gave her sister a desk containing the donor's Post Office Savings Bank book and an investment certificate issued to the donor by the Savings Bank for £50 10*s.* Local Loans 3 per cent Stock, expressing a wish that the donee should have both deposit and investment. Unfortunately the Court felt constrained to sever the gifts—the money on deposit passed, the investments did not. The explanation of these seeming anomalies is that cases of *donationes mortis causâ* oscillate between two elementary principles of equity—the principle on the one hand that equity will not assist a volunteer and the principle on the other hand that equity will execute a trust once created. In the case of the deposit no difficulty was involved: the gift was complete: but the investments presented some difficulty. Under the Post Office Savings Bank Rules depositors may invest through the Post Office in Government securities, and if they like such acquired stock may be taken in their name. In such a case it is clear on the authorities the *donatio mortis causâ* would be bad as an incomplete gift. But in lieu of this purchase of stock in the depositor's name the Post Office may, if the depositor prefers it, invest the money for the depositor just as a trustee would do, and this was what had been done in the case of the donor's deposit. The investment certificate certified that £50 10*s.* Local Loans 3 per cent Stock had been placed on the Savings Bank Investment Account of the National Debt Commissioners and credited in the Government Stock Register of the Post Office to the donor, and this certificate accompanied by the deposit book entitled the depositor under the Rules to have the value of the stock paid him forthwith by warrant at the current price of the day of sale less commission. Why should not this constitute a good *donatio mortis causâ*? The delivery gave—which is the true test—a title to the donee to the assistance of a Court of Equity to make the donation complete.

Spurrier v. *La Cloche*, [1902] A.C. 446, illustrates a well established principle of private international law, the full results whereof it is not always easy to grasp. The principle is that the interpretation of a contract and the rights and obligations of the parties thereto must be determined in accordance with the proper law of the contract, that is the law by which the parties actually or presumably intended the contract to be governed. One result, and a perfectly legitimate result, which follows from this principle is that if a policy of insurance, though made in Jersey, is an English contract, the terms thereof, e.g. as to the settlement by arbitration of the amount due, must be governed by English law, and this even though such terms are invalid by the law of Jersey.

Order XI, r. 1, of the R.S.C. 1883, which in appearance regulates a mere matter of practice, in reality considerably extends the extra-territorial jurisdiction of the High Court. *Duder* v. *Amsterdamsch Trustees Kantoor* [1902] 2 Ch. 132, 71 L.J. Ch. 618, clearly shows that a person *Y*, who being resident in a foreign country cannot be made sole defendant in an action brought against him by *A*, can nevertheless, if *A* has already commenced an action against *X*, be joined as a co-defendant on the ground that he is a necessary or proper party to the action. The suggestion may indeed be made that Order XI, r. 1 (*g*) does not so much extend, as by an improvement of procedure render effective, the extra-territorial jurisdiction of the Court. But jurisdiction which cannot be exercised is no jurisdiction, and any lawyer who will not accept words for facts must perceive that in truth a modern rule of practice has extended the extra-territorial jurisdiction of the High Court.

A marriage contract or settlement will, in the absence of reason to the contrary, be construed with reference to the law of the matrimonial domicil (Dicey, Conflict of Laws, p. 653). *In re Bankes* [1902] 2 Ch. 333, 71 L.J. Ch. 708, affords a good illustration of the circumstances to the contrary which afford a reason for not applying the general rule. *W*, an Englishwoman domiciled in England, marries *H*, an Italian domiciled in Italy. They execute in Italy a settlement in English form; the settled funds are English. The settlement is void under Italian law, but valid under English law. It is held by the Chancery Division to be valid. From this case a result follows which deserves the attention of any English woman about to marry a foreigner. A settlement of her English property will override the law of the husband's domicil, whilst if she marries

without a settlement her right over and power of disposing of her English moveable property will, assuming *In re Bankes* to be well decided, be governed by the law of her husband's domicil. It is well to add, in order to prevent confusion, that there is nothing in this result inconsistent with *Viditz* v. *O'Hagan* [1900] 2 Ch. 87.

Technical niceties are specially out of place in the administration of criminal law, they are generally little better than obstacles to the attainment of substantial justice. It is difficult to believe that the possibility of maintaining an indictment under the Married Women's Property Act, 1882, s. 16, against a wife for robbing and then deserting her husband ought to depend upon the distinction between an exception and a proviso; yet in *Rex* v. *James* [1902] 1 K. B. 540, 71 L. J. K. B. 211, the guilty wife would have escaped all punishment if the judges had not been able to treat certain words in the Married Women's Property Act as a proviso and not as an exception. If ever the time comes when the public and Parliament shall be once more interested in the amendment of the law, reformers will find that there is a good deal of work to be done in simplifying criminal procedure.

A man who wishes to obtain a policy of insurance, and with this object signs a proposal form, ought to read it. If he does not, and the proposal contains averments by him which are in fact false, the policy will be invalid; nor will he improve his position legally by showing that he did not know of the falsehoods contained in the proposal form, though they were known to the agent who induced him to make the application. This is the result of *Biggar* v. *Rock Life Assurance Co.* [1902] 1 K. B. 516, and should be noted by all persons who intend to insure their lives, persons, or property.

P employs his coachman *A* to purchase forage for *P*'s horses and supplies *A* with money to pay for the forage. *A* instead of paying for the forage obtains it from *T* on *P*'s behalf, and says that *P* will pay for it. When *P* declines to pay for it, *T* has no right of action against him; for *P* has neither expressly authorized *A* to pledge his credit nor held out *A* to *T* as a person authorized to pledge *P*'s credit: *Wright* v. *Glyn* [1902] 1 K. B. 745, 71 L. J. K. B. 497. *T* no doubt thinks that he has suffered injustice, but *T* is mistaken; he has been cheated by *A*, but this is no reason for forcing *P* to pay a debt which he has never incurred. The case is instructive in two ways. It illustrates, in the first place, the

true principle of agency, namely, that a principal's liability on a contract made by his agent depends, if we put aside cases of ratification, on his having either actually instructed the agent to contract for him (express authority) or so acted as to give third parties a right to believe that he has instructed the agent to contract for him (ostensible authority). The liability of a principal always arises, in short, from the principal's own conduct. The case illustrates, in the second place, an often forgotten principle of the law of contract, namely, that a person is bound to pay for a service rendered not because he has received a benefit from another person, but because the benefit was conferred on the faith of his promise to pay for it, and not otherwise.

The negotiability of transferable debentures issued by limited companies has been affirmed by Bigham J. in *Edelstein* v. *Schuler & Co.* [1902] 2 K.B. 144, 71 L.J.K.B. 572, following Kennedy J.'s decision in *Bechuanaland Exploration Co.* v. *London Trading Bank* [1898] 2 Q.B. 658, 67 L.J.Q.B. 986. In one respect the present case goes farther, for Bigham J. was prepared to hold that the custom of merchants to deal with such instruments as negotiable need no longer be proved, but the Court will take judicial notice of their character. The principle 'that the law merchant is not fixed and stereotyped' is strongly asserted by the learned judge, and it is also pointed out that the volume and rapidity of modern commerce very much diminish any objection to incorporating a new usage in the law merchant merely on the ground that it is recent. These decisions can, perhaps, not be said as yet to have final authority; but the opinion that the law merchant is alive and not dead seems as sound in principle as it is certainly convenient for business, and not at all likely to be overruled by the Court of Appeal or the House of Lords.

We are reminded by the case of *Pearks, &c. Ltd.* v. *Ward* [1902] 2 K.B. 1, 71 L.J.K.B. 656, that the question *utrum universitas delinquere possit*, which has exercised Continental jurists for some centuries, has been settled for us in a downright empirical British manner by the Interpretation Act, 1889, s. 2. 'Person' in penal statutes includes a body corporate, unless the contrary intention appears. Such an intention may appear from the offence including the positive element of some particular knowledge or intent, or the negative element of failure to fulfil some condition which can be fulfilled only by a natural person. The fact of the penalty being not perfectly applicable to a corporation (e.g. imprisonment in default of paying a fine) seems not to be conclusive, see per Channell J.

X shunts some vehicles on to a railway siding whence they cannot move unless a brake is unscrewed, but *X* knows, or ought to have known, that boys often unscrew the brakes, and that if the brakes are unscrewed the vehicles may run down an incline and cause injury to a third party. The brakes are mischievously unscrewed by some boys, and *A* is in consequence damaged. *X* is liable for the damage sustained by *A*: *McDowall* v. *G. W. Ry. Co.* [1902] 1 K. B. 618, 71 L. J. K. B. 330. This may seem rather hard upon *X*, for the immediate cause of the damage to *A* was the wrongful act of a third party; but the principle followed by the Court is clearly sound. *X* is fairly liable for all damage caused to third parties by dangers which *X* could foresee and negligently omitted to guard against. *X*'s negligence is not excused either legally or, we may add, morally by the fact that it would have been harmless but for the foreseen though unlawful misconduct of *N*.

An innkeeper cannot lawfully pick and choose his guests; as long as he has a bedroom vacant he must provide a bed for any respectable traveller who applies for it, but he is not bound to cram his house with as many persons as it can physically hold, nor is he under any obligation to accommodate a traveller by turning a coffee room into an extempore bedroom. This is the effect of *Browne* v. *Brandt* [1902] 1 K. B. 696, 71 L. J. K. B. 367. The case is well decided. If the common law rules as to the duties of innkeepers are to be kept in force they must be construed in accordance with the dictates of common sense.

Under the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 46, the jurisdiction of justices to entertain proceedings for an assault is ousted whenever 'any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom.' *Rex* v. *French* [1902] 1 K. B. 637, 71 L. J. K. B. 382, determines that the words 'title to' govern, not only the words 'lands, &c.,' but also the words 'any interest therein or accruing therefrom,' or to put the matter a little less technically, if *X* and *A* quarrel, and *X* assault *A*, the jurisdiction of the magistrates to entertain a complaint on the part of *A* is not ousted by the mere fact that the quarrel between *X* and *A* had some reference to the use of land by *A*.

The religious element in archaic law, which has long held an important place in anthropological inquiry, seems to be now getting its due among students of legal history from the lawyer's

point of view. In the annual of the 'Istituto di storia del diritto romano' of the University of Catania for 1901–2, Prof. Zocco-Rosa maintains the ritual origin of the *sponsio* against some recent objections, we think with complete success. Oath and libation were both, almost certainly, material parts of the ceremony in its early form. The learned author notes the survival of the ancient and medieval *fides facta* in the custom of shaking hands to bind a bargain, and thinks that a hand-grip was also part of the *sponsio*. We rather think that the giving of faith by the hand (which, even if not religious in its origin, was certainly treated as creating a religious obligation in both classical and medieval morality) has an independent history, and that, although it may well have become associated with the *sponsio*, there is no sufficient evidence that it did.

Then we have an interesting tract on 'Ancestor-Worship and Japanese Law' (Tokio, 1901) from Nobushige Hozumi, Professor of Law in the Imperial University of Tokio. Ancestor-worship is universal in Japan, even among Buddhists, whose religion strictly has no place for it; and contact with Western civilization has in no way shaken the practice. The author properly distinguishes the worship of benignant ancestors to whom offerings are made for the spiritual benefit of themselves and their posterity from the propitiation of hostile spirits merely to avert evil. He does not mention that in special circumstances ancestors, having been offended (by former neglect of the proper offerings, for instance), must be propitiated, which goes some way to account for seeming contradictions among the learned who treat of these matters. The social and legal importance of ancestor-worship is that it is a bond, in some stages the most effective bond, of family, tribal, and in Japan, through the imperial dynasty, of national union. The Japanese law of marriage and adoption, so far as determined by ancestor-worship, appears to present remarkable analogies to the corresponding institutions of Hindu law, though there does not seem to be anything like the elaborate sacerdotal development of the Bengal school. We should like to see these worked out by some competent Japanese scholar; we do not think there can be any question of borrowing. It is curious that no parallel to the well-known *improba usucapio* of early Roman law (Gai. ii. § 55) has been found in any other system.

A learned Canadian contributor sends us the following note on Statute Law Revision in Ontario:—

By various Provincial Acts the laws of England at different

periods have been introduced, e.g. by our first Provincial Parliament on the establishment of Upper Canada (32 Geo. 3, c. 1) it was enacted that 'in all matters of controversy relative to property and civil rights resort shall be had to the laws of England as they stood on October 15, 1792.' Afterwards it was provided by another Provincial Act that the Superior Courts of Law should have the like jurisdiction as that used, exercised, and enjoyed by any of the Superior Courts of Common Law at Westminster in England on May 5, 1859; and by another Provincial Act the Provincial Court of Chancery was vested with the like powers possessed by the English Court of Chancery in the matters specified in R. S. O. c. 51, s. 26 on March 4, 1837, and later there was conferred on the Provincial Court the like jurisdiction and power as the English Court of Chancery possessed on June 10, 1857, as a court of equity to administer justice in all cases in which there existed no adequate remedy of law; and still later by another Provincial Act the equitable jurisdiction in matters of revenue possessed by the English Court of Exchequer on March 18, 1865, was vested in our former Court of Chancery, all these powers so vested in the former courts of law and equity being now vested in our High Court of Justice.

Save as altered the English probate practice as it stood on December 5, 1859, was made applicable to our Surrogate Courts.

The result of these enactments was to incorporate into our provincial law a body of Imperial statute law scattered through numerous volumes, and what has been done is to gather together these various statutes and revise and consolidate them: and the volume sent you is the result of such revision and consolidation, and it appeared to me that it is an object-lesson of some value as showing the small amount of really vital law which remains after the chaff is sifted out.

Some of the enactments included in the volume were passed as substantive statutes prior to this inclusion in this volume of our Revised Statutes, e.g. chap. 324, ss. 41–44, which has been criticized as not being technically right, on the ground that the King cannot be disseised. You will see it is an adaptation to the King of the provisions of the Real Property Limitations Act, in lieu of the English Nullum Tempus Act. Chap. 332, which is an adaptation of the Imperial Act 55 & 56 Vict., was also passed as a substantive Act, and there are some other sections scattered through the volume also as passed.

It may seem somewhat anomalous that the volume is called the Revised Statutes of Ontario, 1897. But the last revision of the rest of our statute law took place in that year, and it was thought desirable to apply that title to the present volume, notwithstanding that

it actually includes some enactments of a later date, they being in effect revisions and consolidations for the most part of statutes existing in 1897.

The statutes dealt with are those only affecting property and civil rights, Criminal Law being under the control of the Dominion Parliament.

GEO. S. HOLMESTED.

In our review of Mr. Chalmers-Hunt's book on Trade Unions in the July number, L. Q. R. xviii. 323, it was stated, in effect, that there is no other recent annotated edition of the statutes relating to Trades Unions. Mr. Herman Cohen has pointed out to us that 'Trade Union Law and Cases' (London, 1901, see L. Q. R. xvii. 217), of which the text is by Mr. Cohen and the introduction by Mr. George Howell, answers this description. We note and regret the oversight.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

EXECUTIVE AND JUDICIAL FUNCTIONS IN INDIA.

THE complete separation of the executive from the judicial functions in India was described by the late Lord Dufferin as a counsel of perfection. The separation has been persistently demanded by reformers, chiefly in Bengal, for many years past. The earliest objection to the union of executive and judicial functions occurs in the first section of Regulation II, 1793, issued by the Government of India; but as this has reference rather to the union of civil judicial powers with executive functions, it is not necessary to consider it here. Civil powers, except in so far as they are exercised by Courts of Revenue, have long since been divorced from executive functions, and the dispute at present relates exclusively to the union of criminal judicial and executive functions in one and the same person. Even with this limitation, the dispute is of no recent origin. In 1838 Sir F. J. Halliday, who at that time was a member of a Committee appointed by the Government of Bengal to draw up a plan for the more efficient organization of the police, wrote as follows:

'The first and most prominent defect of our system I take to be the union of executive and judicial functions in the Magistrate. "There is no more important principle in jurisprudence," says a late writer on this subject, "than the separation of the judicial from the executive ministerial functions." The truth of the proposition is almost self-evident.'

The question of separation was for some years mingled and considered with the alien question of the best training for civilians in order to fit them to fill the office of judges. The scheme at present in vogue was adopted; judges were deprived of all executive functions, but were retained under the executive orders of the Local Government, so that even to-day the order for the transfer of a Munsiff, who is employed on civil judicial work and on nothing else, is issued by the Local Government and not by the High Court of Judicature. When the agitation for the separation of judicial from executive functions in the case of the District Magistrate revived, it was for the time practically decided by the opinion of Sir Fitzjames Stephen. In his Minute (printed as No. XXXI of the Selections from the Records of the Government of India, Home Department, dated 1872) he wrote thus:

'The best division of labour at present to be had would divide not the judicial and executive branches of the service, but civil jurisdiction and criminal jurisdiction united with executive power. . . . It seems to me essential that the position of the district officers should not be materially weakened; but, if their whole judicial power were taken from them and confided to purely judicial officers, nothing would be left in their hands except miscellaneous executive functions. They would have the duties of engineers, health officers, way wardens, &c., but they would have no authority which would excite in the minds of the people at large either hope or fear in regard to them, and they would certainly be deprived of one most effectual way of becoming acquainted with their habits and feelings. The exercise of criminal jurisdiction is, both in theory and in fact, the most distinctive and most easily and generally recognized mark of sovereign power. All the world over, the man who can punish is the ruler. Put this prerogative exclusively in the hands of a merely judicial officer who has no other relations at all to the people, and who passes his whole life in a court, and I can well believe that the result would be to break down in their minds the very notion of any sort of personal rule or authority on the part of the magistrate.

'I do not think that, situated as we are, the law can ever be carried out effectually, except in one of two ways, namely, either by the strong personal influence of magistrates known to and mixing with the people, or by an enormously increased military force. In a few words, the administration of criminal justice is the indispensable condition of all government and the means by which it is in the last resort carried on. But the district officers are the local governors of the country, therefore the district officers ought to administer criminal justice.'

Another eminent authority, Sir John Strachey, who spent the best years of his life in India, enounced a similar opinion in his work on India (chap. xx, p. 287, 2nd edition):

'We often hear demands for the complete separation of executive and judicial functions in India, but they are demands based on the assumption that because this is good for England it is good for India also. There could be no greater error. The first necessity of good administration in India is that it should be strong, and it cannot be strong without the concentration of authority. In the everyday internal administration there is no office so important as that of the Magistrate and Collector. He is one of the mainstays of our dominion, and few steps could be taken in India which would be more mischievous and dangerous than to deprive him of those powers which alone enable him to maintain his position as the local representative of Government.'

The present agitation for separation of the criminal judicial from the executive functions dates from 1896, when Mr. Manomohan Ghose published, with an introductory note, his compilation of the

different opinions which had been officially recorded in favour of the separation of executive and judicial functions in Bengal, together with another introductory note prefixed to his notes of twenty cases illustrating the evils of the present system. Mr. Manomohan Ghose had commenced practice at the Calcutta Bar in 1867, and in his introductory note he relates that he was much struck with the frequency of cases involving gross abuse of judicial power on the part of the magistracy in the interior of Bengal, and that he soon discovered that it was the system rather than the individual officers concerned which was primarily responsible for the frequency of these cases. He did not preserve his briefs prior to 1874 or he might, he says, 'have included several instances which occurred prior to that year, the facts of which in some respects were just as striking as any of those now given.' He adds:

'A period of twenty years, however, is long enough for my purpose, but I must guard against its being supposed that I have included all or nearly all the cases bearing on the subject in which I have been myself professionally engaged during these twenty years. I have omitted all petty cases of almost everyday occurrence, and I have likewise not included those which have occurred in the other Presidencies of India, or even in Bengal, the facts of which I am not personally in a position to speak to, but of which the newspapers have been full during the past twenty years.'

In 1899 a memorial in favour of the separation of executive and judicial functions was presented to Her Majesty's Principal Secretary of State for India by Lord Hobhouse, who was Legal Member of the Viceroy's Council from 1872 to 1877; Sir Richard Garth, who was Chief Justice of Bengal; Sir Richard Couch, another late Chief Justice of Bengal; Sir Charles Sargent, who from 1882 to 1895 was Chief Justice of the High Court of Bombay; Sir William Markby, late a Judge of the High Court of Calcutta and afterwards Reader in Indian Law at Oxford; Sir John Budd Phear, late Chief Justice of Ceylon; Sir John Scott, late a Judge of the High Court of Bombay and subsequently Judicial Adviser to the Khedive of Egypt; Sir William Wedderburn; Sir Roland Wilson, who for twenty years was Reader in Indian Law to the University of Cambridge; and Mr. H. J. Reynolds. The opinions of Sir R. T. Reid, Q.C., M.P., Attorney-General 1894–5, and Sir Raymond West, late Judge of the High Court, Bombay, are also mentioned at par. 14 of the memorial as being favourable to its object. It will be noticed that these opinions are nearly all those of eminent judicial officers. The consensus of opinion of executive officers has been, perhaps naturally, opposed to the separation. Sir Charles Elliott, who had been Lieutenant-Governor of Bengal, published in

the Asiatic Quarterly Review for October, 1896, an answer to Mr. Manomohan Ghose, strongly upholding the present system; and he was answered in the January number of the same review by Mr. C. D. Field, LL.D., late a Judge of the High Court of Calcutta, and in 'India' for November, 1896, by Sir John Budd Phear and Mr. H. J. Reynolds, C.S.I. In the province of Bengal it may therefore be said that the weight of high judicial authority is in favour, while the weight of high executive authority is probably against, the proposed separation of executive from judicial functions. In the province to which I had the honour to be attached, that which until recently was known as the North Western Provinces of India, the question of separation has never been seriously mooted, and there is in my own mind no doubt that the time for the change is not yet. As Mr. Field has said:

'India is too vast for generalization. Reforms that are well and wisely made in one province, at one point of time and progress, may be unwise, even injurious, in another province, where the stage of progress and other conditions are different.'

The change, if it ever comes, will certainly be introduced very gradually. Criminal work is performed by the Sessions Judge, by the District Magistrate, and by Magistrates of the first, second, and third classes subordinate to the District Magistrate. It is practically useless to discuss the question of the separation of executive and judicial functions so far as Magistrates subordinate to the District Magistrate are concerned, but it may be worth while to consider the question so far as the Sessions Judges and the District Magistrate are concerned. With this limitation the question may be considered under the following heads:

(1) The removal of Sessions Judges from the executive control of the Local Government to that of the High Court;

(2) The removal of appellate work from the hands of the District Magistrate; and

(3) The removal of original criminal work from the jurisdiction of the District Magistrate.

(1) Sessions Judges are at present appointed and transferred by the Local Government, the views of the High Court being occasionally consulted, and any recommendations which that body may make being taken into consideration. All appeals from the decisions of the Sessions Judge, and all applications for a revision of his decisions, are made to the High Court; while the only records of his Court which come before the Local Government are those in the very infrequent cases in which the District Magistrate has moved that Government to appeal against a verdict of acquittal.

The High Court has thus innumerable opportunities while the Local Government has the slightest chance of becoming acquainted with the nature of a Sessions Judge's work; the High Court is therefore naturally much the best judge of his fitness for the particular post or judgeship which he holds, and is better fitted than the Local Government to decide as to his removal or transfer. By retaining, however, the power of removal or transfer, the Local Government retains considerable power over its Sessions Judges. It can without reason assigned transfer a judge from a healthy to an unhealthy station, from a favourite to a desolate district, from a large to a small judgeship. As Mr. Manomohan Ghose is reported to have said:

'A judge whose verdict or decision does not meet with the approval of the District Magistrate is privately reported against to the Government, it may be through the Commissioner of the Division, and the Government has the power of transferring him to an unhealthy station or of delaying his promotion.'

'Judges . . . have to look up to the Executive for promotion and preferment, and if their decisions are subjected to criticism by the Executive such as the Magistrate of the district, the Commissioner of the Division, or an Under-Secretary to the Government, it must impair the feeling of independence which every judicial officer ought to possess.'

Sir Richard Garth was of opinion that 'to make a judge's promotion dependent on the favour of the chief police officer is a direct and most unwholesome incentive to him to gratify his master's wishes.' These views seem to me to make the Sessions Judge out to be a much more subservient and time-serving individual, a much less honourable and upright officer, than any whom it has been my fortune to meet; but nevertheless they do contain a substratum of truth. There is no doubt that the Local Government at times is prone to regard the Sessions Judge as its own humble servant, bound to take direction from itself when required. It is only a few years ago that a Sessions Judge was trying a native police officer at Lucknow: the English district superintendent of police gave evidence to the effect that this native police officer had been ordered to shadow certain persons as disaffected and traitorous: on which the Lieutenant-Governor, instead of sending a witness to give evidence, at once telegraphed to the Court that the persons ordered to be shadowed were not disaffected to, but were trusted by, the Local Government. But notwithstanding that the Lieutenant-Governor may thus at infrequent intervals allow his interest in the peace of his province to override all sense of judicial propriety, there can be very little doubt that

the Local Government is right to retain for the time in its own hands the power of removing and transferring Sessions Judges. The reason lies in the great difference which exists between England and India in the administration of the more important and serious portion of criminal justice. The work which in England falls to the judges of assize corresponds roughly with that which in India, in respect of native prisoners, falls to the Sessions Judges. The list of offences exclusively triable by the Courts of Assize is indeed considerably larger than that of offences exclusively triable by Courts of Session in India: but magistrates in India exercise to a very wide extent their power of committing for trial by the Court of Session any offence which they find to have been committed and for which the punishment which they are able to inflict, i. e. rigorous imprisonment for two years, is in their opinion inadequate. In this way the list of offences falling for trial before a Court of Session is roughly much the same as that which falls for trial before the Court of Assizes in England. But there is a vast difference between the number of offences to be tried. The Courts of Oyer and Terminer and General Gaol Delivery (usually called the Assizes) 'are held at certain intervals throughout the year, and at the least twice in the year in and for every county in the kingdom,' with an exception as to the metropolis and parts of the adjacent counties. The judges sit at the assizes as royal commissioners: but the most important work of the judges is at the Law Courts, where they sit during the whole or the greater part of the four terms of each year. The assizes are held twice in the year, at the spring and the winter assizes. The entire work of the assizes falling to any judge occupies him for a few weeks only out of the twelve months: whereas the criminal work falling to an Indian judge, who is also a civil judge, occupies him for a considerable time during every month of the twelve. In some judgeships the criminal work is so heavy that the judge has no time to devote to civil work: and in many judgeships the criminal work occupies the judge for two-thirds or three-quarters of the whole time he is sitting. So much is this the case that in several judgeships the Local Government has had to appoint additional sessions judges to whom the sessions judge is empowered to delegate part of his criminal work. The first point of distinction is therefore that the criminal work falling to an ordinary judge is vastly heavier in India than it is in England. In some respects it is also more important. Crime in England is more scientific than it is in India; but there is probably more systematic crime in India than in England. The operations of the Long Firm far surpass in ability anything that the Indian housebreaker can show: but the latter makes up in quantity what is lacking in quality. But there

is nothing in England corresponding to the dacoity or gang-robbery, which infests so many a district in India. Dacoits are the *élite* of Indian robbers: many of them carry their lives in their hands: they assume disguises, specially delighting in passing themselves off as policemen 'doing a raid': and some of them are adepts in the use of English 'swear-words.' A good dacoit leader is a tactician and a leader of men. Offences are seldom committed by the gang in the neighbourhood of his house. Some wealthy money-lender or grain-dealer, known to possess a goodly store of ornaments and cash buried in his premises, is selected as the object of the raid. His house is first of all inspected by one or two of the gang, who may possibly belong to the same village as the victim: but there is comparatively little need for local inspection. The gang assemble at a rendezvous at some distance from the house which they intend to attack; they wait until night has fallen and reach their desired haven about midnight or later. The members of the gang carry guns, swords, spears, or the customary Indian lathi: they commonly have a torch or two, which they light when they near the village. As soon as they have surprised the house, a guard is set outside, and one or two guns are fired to scare away the villagers. Then work commences. Any stalwart men, likely to resist them, are knocked down and a guard set over them to prevent their escape. The ordinary Banya, however, is a timid man—not an Afghan or a Rajput, as he explains—and comparatively little force will lead him to disclose where a part at any rate of his gains is buried. When the head of the house is away from home, women are often seized and tortured to make them point out the caches. When the robbers have made their haul, they assemble outside the house, again fire a gun or two to scare away intruders, and make off with their booty to the place where it is to be divided before the gang separates. Two or three gangs of determined dacoits will play havoc with a district, spreading terror through the country-side, and it is necessary in the interests of the public peace that they should be firmly dealt with when caught. The evidence is usually that given by the people in the house itself and by some of the neighbours. The crime being almost invariably committed by night, the first question which arises is as to the amount of light available for purposes of identification. Of this there is usually no lack; light is needed for the looting, and the bolder dacoits trust to terror for warding off the chances of detection. When the torches which they bring with them are insufficient for their purpose, they tear down part of the thatch from the roof, and make a goodly blaze with it. The female witnesses in a dacoity case invariably assert that they were too frightened to look at the faces of the men who

assaulted them. The Banya himself is too chicken-hearted a man to have used his opportunities to the full, and the word of one who professes to be able to identify a great many of the invaders of his house is generally to be received with suspicion. His men-servants, however, are usually made of sterner stuff, and may be able to identify the men who knocked them down or kept guard over them. Occasionally, but not frequently, the difficulty of identification is increased by some of the dacoits wearing their head-cloths tied round their faces, instead of wearing them on their heads in the ordinary fashion; but the bolder dacoits disdain disguises of this nature. The evidence of neighbours is that given by those who have been bold enough to creep near the scene of the dacoity and to espy from some coign of vantage what is happening. In every village there are unexpected nooks and corners from which a view of the outer court-yard, not of the women's quarters, of a house may be obtained over a bit of broken wall or from some by-lane; and evidence of this kind, when trustworthy, is very valuable. Occasionally it is supplemented by that of some one who has seen the dacoits coming to or leaving the house or village, for owing to the noise and hubbub which obtains, nearly the whole of the villagers are on the alert. When the dacoits depart, the dacoity is over; but the police case has still to begin. The owner of the looted house will probably continue for some time sobbing, like a child that has lost its mother, for the loss of the ornaments and cash that he will never see again; or he may have been so maltreated by the dacoits as to be for the time physically incapacitated and unable to make a report of his loss: in this case some relative or friend or agent will bethink himself of the necessity of reporting the matter without further delay to the police. He will, however, not go himself to the nearest police station, any more than the Banya himself would, if able; he will call the village watchman, tell him what he knows or surmises, and the watchman or other messenger will then go to the station and will there retail what he remembers of what was told him. The report is taken down by the police clerk, and is signed by the man making it, and this forms the first piece of documentary evidence in the case. Very frequently all its value amounts to this, that the man making the report has been told that at a certain place and time a dacoity was committed by certain persons unknown. The police lose no time in coming to the scene of the offence, and one of their first cares is to obtain a list of the articles stolen. This, however, involves a search, a consultation of account-books, and takes time; the first list is often supplemented by a second, and it is necessary to fix with accuracy the exact date and time at which each list reaches

police custody. If an article is found on a Wednesday, and the list containing the mention of that article is not filed until the Thursday, the genuineness of the entry is naturally open to suspicion. It is of importance, moreover, that the list should be as complete as possible in details as to the make and weight of the articles mentioned therein. A Hindu knows to a couple of ounces the weight of all his pots and pans, and to half an ounce the weight of every article of jewellery in his possession, and he knows the length and pattern of every cloth belonging to his wife: the money-lender may not be equally cognizant of the details of every article pawned with him, but he usually enters them in an account-book at the time he lends the money. Hence arises the extreme importance of an accurate list of the stolen property. The next care of the investigating police officer is to search for any clue to the offenders; and this he usually fails to find, no one knowing anything as to who were the actual offenders. He summons all the bad characters from the surrounding villages, inquires who among them have been absent from their homes for the last day or two, and in this way is often able to make a shrewd guess at one or two who have had something to do with the dacoity. A man who finds himself thus the object of suspicion may try to make terms by confession. He knows of others who have confessed and who have thereby escaped punishment, or he knows of some who are used by the police as spies and decoys and who seem to bear a charmed life, or he desires to escape further duress, and he tells what he knows. He is forthwith haled before the nearest magistrate and his statement is recorded, and becomes matter of record against him. He returns to the custody of the police: the men whom he has named as his accomplices are looked up and their houses are searched. Most of the property obtained by the dacoity has been securely buried or melted by this time, but here and there a piece may be found. A troublesome inquiry attends the finding of each article found. The search has to be made in the presence of two respectable men of the neighbourhood, who have, among other points, to satisfy themselves, and subsequently to satisfy the Court, that the searchers were themselves searched, before they entered the house, to ensure that they had nothing concealed about their persons. It is next necessary to ascertain that the place in the house at which the property is found is such that no outside person could have access thereto and could plant the property there. It may be that the property is dug up somewhere in the jungle: and in this case the identity of the man who first points out the place of concealment is the all-important point. When the police consider that they have discovered all that is likely at present to be known in

the case, the confessing prisoners are sent to join the others in the lock-up, and the case is taken before a magistrate. In the interval which elapses between the sending-up the case and the magisterial inquiry, or again in the interval between the magistrate's committal of the case and the trial in the Court of Session, the confessing prisoner or prisoners may, and commonly do, resolve to retract their confessions, their usual explanation being that they were taught by the police what to say, and were threatened or tortured until they agreed to say it. A scrutiny of the time which has elapsed between their coming into custody and the record of their confession is generally sufficient to show that this plea is false: but a very common phase of a dacoity case when it first appears in a Court of Session is that it rests on a retracted confession supported by a certain amount of corroborative evidence as to alleged identification of the dacoits and finding of stolen property. The value of the confession has to be determined, and the other evidence weighed. The character of the witnesses, some of whom are unduly timid, while others are unduly hasty, some being afraid of future visits from the dacoits, while others are anxious to convict any bad characters; their opportunities of accurate observation; their memory, which is sometimes taxed in the Court of Session months after the facts have occurred: all these, and other considerations, have to be taken into account. Judges in India, again, are not men of such wide experience and of such knowledge of human nature as are the assize judges in England, nor are they aided by a jury (except in a few exceptional cases) in taking a common-sense view of the facts; some of them are constitutionally timid of conviction; while a few others, chiefly native judges, are afraid of their convictions being upset on appeal to the High Court: and for all such judges there are almost invariably contradictions or discrepancies in the evidence of witnesses on which they can base a verdict of acquittal. It is true that an acquittal is not final in India as it is in England. To set aside an acquittal, and to procure a new trial, the initiative has to be taken by the District Magistrate, who moves the Local Government: the record is sent to the Legal Remembrancer for opinion, and he is naturally chary of recommending an appeal on a question of fact only: if an appeal is determined on, it is made to the High Court, and the case is then reheard by that august tribunal: a certain number of these appeals are successfully made every year. The object of the Local Government is to secure for every important judgeship a judge who will convict when, according to the provisions of the Indian Evidence Act, he should convict, and whose convictions will stand the test of the appeal to the High Court which invariably follows. A judge who convicts

rashly, and on insufficient evidence, is as obnoxious to the Local Government as is one who will not convict a man if he can possibly acquit him. Hence the Local Government clings to its power of being able to appoint and to transfer judges at its own discretion. Besides being himself remiss in the disposal of cases committed to him for trial, a Sessions Judge may also err in the disposal of his appellate work. He hears all the appeals from convictions by first-class magistrates in his judgeship: and here also there are many opportunities for slovenly or unconscientious work. The necessity for securing strong and upright judges to dispose of the important criminal work in a backward country, and the fact that the staff of judges consists of men of various calibres, some of them being new and untried, are the chief reasons why the Local Government should still retain the powers with which it is by law invested. On the other hand, the Local Government takes very little thought for the disposal of civil work. The Sessions Judge is also the District or Civil Judge for each district in his judgeship, and his work in this capacity is important to the civil suitors in the judgeship. He does little or none of the ordinary original civil work: this is done, and most efficiently performed, by the munsiffs and subordinate judge of whom the District Judge is the executive superior. But the appeal in every appealable suit, the value of which does not exceed rupees five thousand, lies to the District Judge; he can transfer to the subordinate judge for disposal appeals in suits not exceeding rupees one thousand in value, but the remaining appeals he must himself dispose of. He has also a variety of miscellaneous work—probate, succession, company cases, and the like—under a variety of small acts. For all this work, by far the most interesting work which falls to his lot, it is necessary that the District and Sessions Judge (to give him his full title) should be acquainted with a certain amount of the civil law. The only civil work which much concerns the Local Government are the very occasional original suits in which it appears as plaintiff or defendant, and these go either to a munsiff or to a subordinate judge: so that the Local Government has very little direct interest in the fitness of a District and Sessions Judge for the civil part of his work. It is therefore his capacity as a criminal rather than as a civil judge which decides the Local Government in allocating a particular member of their judicial staff to one district rather than another. When the country becomes more civilized, and a judge's criminal work ceases to possess the preponderating importance which it at present assumes, it will become safe to transfer the executive charge of judges from the Local Government to that body, which is most intimately acquainted with all the branches of their work, the High Court of Judicature.

Another matter of importance on which it may be as well to add a few words here relates to the *personnel* of the judicial service. The Local Government, being mainly responsible for the executive work of the province, is naturally anxious to secure the best men for executive work. The great prizes on the executive side, the secretaryships to the Government of India, seats on the Viceroy's Council, Chief Commissionerships, and Lieutenant-Governorships, are much better paid and more attractive than the prizes on the judicial side: so that the ablest and most ambitious men in the service are anxious to avoid removal into the judicial branch. These considerations naturally determine an abler set of men to the executive than to the judicial branch of the service. The consequence is that selection for the judicial branch is popularly regarded, especially among junior civilians, as a stigma rather than as an honour. Occasionally, when the influx of men whose only recommendation for judicial work is their unfitness for executive becomes excessive, the High Court complains, and then for a season a better lot of men are drafted into the judicial service. But the old tendency sooner or later re-asserts itself: and it is a distinct impairing of the popularity and efficiency of the judicial branch of the service. So long as the judges remain under the executive authority of the Local Government, the evil appears to be irreparable: but if they are transferred to the executive authority of the High Court, there is no reason why the judicial service should not regain the honour and dignity which are its right. To this end, however, an alteration in the mode of recruitment is probably desirable. At present recruiting takes place from the civilians and the subordinate judicial service, the latter, however, being utilized to a very small extent. When judges go on leave or furlough, the temporary vacancies thus occasioned have to be filled: and these are filled from the senior ranks of civilian joint magistrates and from subordinate judges. These temporary vacancies are an excellent means of trying new men for the appointments, and also of letting new men try the appointments: it often happens that a young civilian, who has hitherto *more suo* despised the judicial branch, finds the work so much to his taste that he is desirous henceforward of becoming a judge: the High Court also is able to try his work and to judge of his fitness for the post. The same considerations apply in the case of the subordinate judges. As permanent vacancies therefore fall in, they should still be offered to those two classes of men. But there is also a third class of men who are well fitted for the posts. I refer to the advocates of the High Court, the barristers and others, who, after a certain number of years' practice, are well acquainted with the language and the

work, and with whose work the High Court is itself well acquainted. An intermixture of these would certainly strengthen the judicial ranks.

I pass now to consider the question of the separation of executive and judicial functions in the case of the Magistrate of the district. This is the crux of the whole discussion. The District Magistrate hears certain appeals: he has the power of trying cases and of committing for trial: and he exercises a certain control over the subordinate magistracy in his district. I will notice each point separately.

The District Magistrate is only empowered to hear appeals from magistrates of the second and third classes: those from magistrates of the first class and appeals from the District Magistrate himself go to the Sessions Judge. A magistrate of the second class can only pass a sentence of six months' imprisonment or of two hundred rupees' fine, and a magistrate of the third class can pass a sentence of one month's imprisonment and one fifty rupees' fine. These magistrates are usually either honorary magistrates, native gentlemen who have been invested with magisterial powers by the Local Government, or they are stipendiary magistrates who are learning their work. The cases which they decide are considerable in number, but relatively of small importance. The appellate work is also relatively unimportant, and it occupies very little time. So far as most magistrates are concerned, they would have very little objection to the transfer of this part of their work to the Sessions Judge or his assistant, the additional Sessions Judge. Nor would there be any conceivable objection to such transfer.

The case is otherwise with the original criminal work of the District Magistrate. This also, owing to his power of transferring cases, is meagre in quantity. 'Still,' as Sir Charles Elliott points out, 'there are some classes of offences, such as those committed by Europeans, which under the law a native subordinate magistrate cannot try, and there are political *causes célèbres* in which a native might be suspected of bias or weakness.' For the trial of these cases, as well as for the trial of police and other offenders belonging to one of the subordinate services, it is essential that in the North Western Provinces the District Magistrate should retain his present powers. So, too, with the very important proceedings for the preservation of the public peace, which specially concern the Magistrate as responsible for the peace of his district, and from cognizance of which the jurisdiction of the Sessions Judge is ousted by the Code of Criminal Procedure. These are all instances in which it would be the height of folly at present to curtail the powers of the District Magistrate. And under the present system

there is no need to go further: for a District Magistrate has too much other work ever to take up cases which he can reasonably transfer to one of his subordinates: while in respect of the ordinary criminal cases of which he takes cognizance, he is at present subordinate to the Sessions Judge. 'The mischief is done,' says Mr. Reynolds, 'not by the cases which the District Magistrate personally tries, but by his power to try such cases as he thinks fit: by his power to transfer a case from a subordinate who shows signs of independence, to one who will be a ready tool in his hands: by his power to interfere, at every stage of a trial, with advice which is equivalent to a command: by his power at once to conduct the prosecution, and to dictate the sentence.' There is no doubt that a District Magistrate does occasionally contract a bias for the prosecution in cases in which the administration of his district is concerned: but such offences are few, and the judgments are open to appeal to the Sessions Judge: and as regards ninety-nine cases out of a hundred, I think that most natives of India as well as Europeans would use the words of Sir Charles Elliott: 'No doubt such persons may exist, but I do not believe that the picture is true to average human nature.' The ordinary European Magistrate in India is imbued with the strongest sense of justice: and it is this desire to do justice which has won for us the esteem of the native population.

The control of the District Magistrate over his subordinate magistrates has been attacked on the ground that he may use it to affect their judicial independence. This again is possible: but any such abuse of power is certainly most exceptional. That the more inexperienced magistrates stand in need of guidance and counsel is manifest to no one more than to the Sessions Judge who has to hear appeals from their decisions. They frequently evince an utter want of sense of proportion in the sentence passed, and this is their chief fault. They are frequently careless in the initial stage of a case, and then are inclined unduly to procrastinate and postpone the hearing. These, however, are faults to which their attention can be drawn by the Court which hears the appeal: and considering the great frequency of appeals and of applications for revision, which occasionally bring ninety per cent. of their work before the Sessions Court, it may well be the case that any guidance which they require would be as well and efficiently imparted by the Court of Session as by the District Magistrate. Sir Charles Elliott's contention that inspection of the subordinate magistrates' courts is the breath of the District Magistrate's nostrils is fanciful and by no means founded on fact: the frequency of appeal and revision, ensured by the present system of procedure, gets the same

work done much better and more surely. If it were necessary, we might ask with Mr. Reynolds, 'Why should not the judge be as competent as the magistrate to guide and advise? Why should it be taken for granted that he will withhold all supervision till a case comes before him in appeal? Why should inspection duty be impossible to him?' My own point, however, is that the frequency of appeal and revision amply supplies the place of irregular inspection.

I have tried in the foregoing remarks to show that no immediate change in the criminal judicial system now in vogue is necessary, and I have also tried to indicate the direction which the change should take when it comes: and in conclusion I wish again to strictly limit my remarks to that province with which I am best acquainted, the North Western Provinces of the United Provinces of Agra and Oudh.

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N.B.—The quotations in the foregoing article are taken from a useful little compilation, The Separation of Judicial from Executive Duties in India, compiled and edited by Prithwis Chandra Ray, and published by the City Book Society, Calcutta.

SOME RECENT DEVELOPMENTS OF THE DOCTRINE OF *COLLEN* v. *WRIGHT*.

THE recent decision in *Oliver* v. *The Bank of England* (1902, 1 Ch. 610) based on the previous case of *Firbank's Executors* v. *Humphreys* (18 Q. B. D. 54)[1], which seems up to that time to have escaped notice, has introduced such large developments of the original doctrine propounded in the case of *Collen* v. *Wright* (8 E. & B. 647, 27 L. J. Q. B. 215) that it seems worth while to submit that doctrine to some further examination.

The majority of the Court in *Collen* v. *Wright* decided that 'a person who induces others to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent is answerable to the person who so contracts for any damages he sustains by means of the assertion of the authority being untrue,' or, as elsewhere expressed in the judgment, 'the obligation arising in such a case is well expressed by saying that the person professing to contract as agent for another impliedly undertakes with the person who enters into such a contract upon the faith of his being duly authorized that the authority he professes to have does in point of fact exist.' The case of *Oliver* v. *Bank of England* extends this decision by making it applicable to every 'transaction' into which a person is induced to enter by the assertion of another that he is the authorized agent of a third person, whether such transaction involves a contractual relation with the supposed principal or not. In the particular case the 'transaction' was a demand upon the Bank of England to fulfil their statutory duty to register a transfer of consols.

This extension of the doctrine of *Collen* v. *Wright* is, it is submitted, wholly unwarranted by legal principle and unsupported by any other decision except that of *Firbank's Executors* v. *Humphreys* (u. s.), which seems itself to be based upon a complete confusion of legal ideas.

The decision in *Collen* v. *Wright* itself (as was pointed out by Cockburn L. C. J. in his dissenting judgment) was undoubtedly a new departure; intended to meet a difficulty which had recently been encountered by the English Courts in the administration of the law of agency. In order to understand this difficulty it is necessary to go back and briefly review the history of the idea of agency.

[1] Also reported more fully and correctly in 56 L. J. Q. B. 57.

To the Roman law the modern English legal idea of agency was unknown. By the Romans an agent was originally always regarded as a principal. A contract entered into by him, even if ostensibly on behalf of some other person, conferred no rights and entailed no liabilities upon that other person, *vis-à-vis* the other party to the contract. The principal might have rights against his agent, but that was a matter exclusively concerning them. As time went on it was found that this was a hindrance to business, and the rule became gradually relaxed. First, by a series of more or less fictitious actions, rights were granted to the other contracting party against the principal to compel him to perform the contracts entered into by his agents. Later on, rights of action were granted to the principal enabling him to compel the performance likewise of contracts made by his agents against the other contracting party. The root idea however always remained that the agent was himself primarily the principal notwithstanding these relaxations of the strict law. It follows therefore as a necessary corollary that under the Roman law if a person made a contract professing to act as agent for another, who was either non-existent or who had not in fact given him authority, the agent was personally liable on the contract. That contract was primarily his own whatever he might profess; and, if there was in fact no person against whom the relaxations of the law could be invoked, the professing agent remained a principal[1].

I imagine that this is still the law in the case of all countries whose legal principles are based upon the Roman law. In *Collen* v. *Wright* (u.s.) Willes J. (arguendo) says this:

'The liability of the agent is assumed in the Code Civil as a matter so clear that there is no express provision expressing it. It says an agent shall not be liable if he discloses his authority and gives the party with whom he contracts the same full information which he himself possesses. That assumes that the agent would be liable in the contrary event[2].'

In English law on the other hand, from a very early period at any rate, the idea of agency has been quite different. An agent properly so called and professing to act as such is a mere connecting rod between his principal and the other contracting party. The contracts that he makes are the contracts of his principal, and neither rights nor liabilities accrue to the agent thereunder. Now, just as in the Roman law the opposite idea of agency created difficulties, where it was desirable to enforce contractual rights by or against the principal, and drove the courts to more or less

[1] Dig. 14. 1, 17.

[2] Cod. Civ., Art. 1997.

fictitious expedients for bringing the principal and the other contracting party into immediate legal relationship, so in English law it became obvious after a time that the strict interpretation of the law of agency might in many cases work great hardship where third persons contracted with supposed agents who either had no principal or were not authorized by him. If there was any question of fraud, that is if the professing agent stated that he had a principal knowing that he had not, no harm was done; because the injured third party had a right of action at common law for deceit against the agent who had misled him wherein he could recover any damage that he had sustained. The difficulty arose in cases where the agent acted innocently and in good faith. In such a case no action for deceit was possible and the other contracting party might therefore suffer considerable loss and yet have no redress; as the supposed agent had expressly refrained from pledging his own personal liability. Under these circumstances the English Courts had to cast about for some means to avoid an apparent injustice, which could not arise under systems of law based upon the Roman law. In the case of persons professing to act as agents where they in fact had no principal at all, the Courts very early came to the decision that it was best to treat the contract as if the agent had made it on his own account—'Ut res magis valeat quam pereat.' (See *Meriel* v. *Wymondsold*, Hardr. 205; *Cullen* v. *Duke of Queensberry*, 1 Bro. C.C. 101, 1 Brown P.C. 306; *Furnival* v. *Coombs*, 5 M. & G. 736, *Ex parte Hartopp*, 12 Vesey 349.) This rule has since been acted upon in many cases and is now undoubtedly law. See *Kelner* v. *Baxter* (L.R. 2 C.P. 174).

Originally both English and American lawyers seem to have been inclined to treat upon the same principle cases in which the supposed principal was an existing person but had not in fact authorized the contract in question. In *Jones* v. *Downman* (4 Q.B. 235 (*n*)), which was an action by a third party against some agents personally in respect of a contract professedly undertaken by them on behalf of some principals (Messrs. Esdaile & Co., who were an existing firm, for whom they were authorized to act up to a certain point), the agents were held personally liable on the contract itself, and Lord Denman in delivering the judgment of the Court of Queen's Bench says as follows:

'If this be so we have a special authority clearly limited by the principals, and it falls short of sanctioning this particular undertaking... No action would therefore lie on the undertaking against the Messrs. Esdaile, and therefore on the very principle on which the Court of Exchequer acted the defendant must be held to have made himself personally liable. The principle is thus clearly stated

by Mr. Justice Story in his commentaries on the law of agency. "Whenever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal or if he exceeds the authority delegated to him he will be personally responsible therefor to the person with whom he is dealing for or on account of his principal" (p. 226, ch. x, s. 264). This doctrine is supported by numerous authorities and is founded on plain justice. One qualification indeed which the learned author almost immediately subjoins, it is right to make on this doctrine that the want of authority must be unknown to the other party, but in the present instance everything leads to the conclusion that the plaintiff was in this state of ignorance. He had no reason to doubt from any fact that is stated and every reason to trust from the confidential employment of the defendant and his own strong declarations that he had full authority to carry out all that he undertook for.

'Nor will the plaintiff be driven in this case to a special action, for the false assumption of authority which in some cases might be necessary for the language of the instrument is such that if the defendant really had no authority he must be taken to have contracted in his own name and character.'

See too the note to *Thomas* v. *Hughes* (2 C. & M. 530). A few years later, however, the Court of Queen's Bench seems to have changed its mind, for in *Jenkins* v. *Hutchinson* (13 Q. B. 744) which was an action upon a charter-party signed by the defendant as agent for another person without authority but innocently, the Court held that the defendant could not be sued *upon the contract* whatever other rights the other contracting party might have, and Lord Denman says as follows:

'In the absence of any direct authority we think that a party who executes an instrument in the name of another whose name he puts to the instrument and adds his own name only as agent for that other, cannot be treated as a party to that instrument and be sued upon it unless it be shown that he was the real principal and that this rule must be made absolute accordingly.'

The next step was taken in a case of *Lewis* v. *Nicholson* (18 Q. B. 503) where Lord Campbell suggests the kind of action in which the agent might be made liable in cases of this kind. He says:

'I think in no case where it appears that a man did not intend to bind himself but only to make a contract for a principal, can he be sued as principal merely because there was no authority. He is liable if there was any fraud in an action for deceit, and in my opinion as at present advised on an implied contract that he had authority whether there was fraud or not. In either way he may be made liable for the damages occasioned by the absence of authority. But I think that to say he is liable as principal is to make a contract, not to construe it.'

This was the state of the law when the case of *Collen* v. *Wright* was decided, and in that case it was for the first time laid down authoritatively that a person who innocently professed to contract on behalf of another, who was in existence but had not authorized the contract, could not be sued upon the contract itself, but was liable in damages for breach of an implied warranty or collateral contract of his own that he had authority to make the contract in question. It will be observed that the decision of *Collen* v. *Wright* is limited to the case of an agent professing to make a *contract* on behalf of a principal as is clear both from the judgment of the majority of the Court delivered by Willes J. and from the dissenting judgment delivered by Cockburn L.C.J. Indeed a moment's consideration will show that such a liability must be limited to cases of contracts, except it may be in very special cases in which there is a special duty upon the professing agent to make accurate statements to the other contracting party. *Ex hypothesi* the statement is an innocent one; and therefore, apart from any question of contract, it is merely an innocent misrepresentation which gives rise to no cause of action for damages, but is merely a ground for setting aside the contract if application be made therefor in due time. The only conditions under which such an innocent misrepresentation can be made the foundation for an action for damages is where it amounts to a warranty in the strict sense of the term. There is probably no word which is so often used inexactly in legal phraseology as the word 'warranty.' In connexion with an ordinary policy of Marine Insurance it is twice used and in neither case correctly. We talk about a 'warranty' of sea-worthiness which is not a warranty but a statement constituting a *condition* precedent to the contract, the untruth of which does not give rise to a right to damages but to a right to avoid the contract. Again, we constantly say that a cargo is 'warranted' free from average under ten per cent. or the like. This again is not a warranty but a *proviso* of the principal contract, and if expanded it would run 'provided always that no claim shall be made under this policy in respect of partial damage to the said cargo unless such damage shall amount to ten per cent. at least of the value thereof.' A warranty proper is neither a mere statement (although such statement may be a condition of the contract) nor a proviso, but a *bargain*. It is a bargain by one of the contracting parties or indeed by any one else (for it will be found upon reference to the old digests that warranty and guarantee are used convertibly) in consideration of the principal contract being entered into that a certain state of facts exists. Like every other contract it requires a good consideration, and that consideration is the agree-

ment of the other party to enter into the principal contract. In other words a warranty properly so called is a contract collateral to a contract and made in consideration thereof, and this is the only kind of warranty a breach of which gives rise to an action for damages *per se*[1]. *Collen* v. *Wright*, as I have said, was properly confined to cases of contract and was always regarded as being so confined until the case of *Firbank's Executors* v. *Humphreys* (u. s.).

That case is worthy of some careful consideration, more particularly as it is so badly reported that some of the most important facts are doubtful. Firbank was a contractor who had contracted with a Parliamentary company called the Charnwood Forest Railway Company to construct a line of railway for them; for which he was to receive cash payments upon the certificate of the engineer of the company. The financial arrangements which had been made to provide for these cash payments broke down. The engineer's certificates were not honoured, and Firbank pressed for payment. Thereupon the company and Firbank made a new agreement under which Firbank agreed to accept debenture stock of the company instead of cash. Pursuant to this agreement the defendants, who were directors of the company, issued to Firbank certificates for £18,400 debenture stock of the company. At the time when the new agreement was made and the certificates were issued, the whole borrowing powers of the company were exhausted, but of this the defendants were not aware, the facts having been misrepresented to them by the secretary of the company. The company ultimately became insolvent, and Firbank's executors then brought an action against the directors personally, on the ground that they had represented and warranted to him that the certificates were good and valid, and that they, as directors, had authority to issue them; which was contrary to the fact. It is obvious that as regards the *validity* of the certificates there was no *warranty*, and as any mere representation of their validity that was made was innocent it could give rise to no cause of action and therefore that part of the claim must fail; and the whole stress of the argument went upon the fact that the directors had impliedly warranted that they had authority to issue the certificates. One would have thought that a cursory examination of the facts would have made it clear (1) that there was no warranty inasmuch as (*a*) there was no contract, but the directors were merely carrying out a ministerial act in pursuance of a bargain already binding upon their principal, and (*b*) that there was

[1] As emphasizing this statement it may be noticed that in *Collen* v. *Wright* the action was brought *against* executors, and in *Firbank's Executors* v. *Humphreys* by executors, and that the right and liability respectively would not have passed to the executors at all if not contractual.

no consideration for any such warranty, as the rights of the parties had already been determined by the previous contract; (2) that if the directors did warrant such authority, they in fact had it, inasmuch as their company was bound to issue the certificates if called upon, and therefore the directors were merely fulfilling the obligation of their principal; and (3) that even if the directors were liable, the plaintiffs could only be entitled to nominal damages at the most, because they had received from the defendants the very thing that they had bargained for.

No one can suggest that an agent who in fact has authority from his principal to enter into a contract warrants the validity of that contract, or that it is not contrary to law, or infected with any kind of vice, or that it can in fact be carried out. The most that an agent warrants under the most extreme view of *Collen* v. *Wright* is that his principal has authorized him to make the particular contract in question. If the form of action had been so framed it is possible that the directors might have been liable in an action on an implied warranty that at that date they had power to enter into the contract at all on behalf of the company. The directors of a company have in several cases been held liable on similar implied warranties where they had induced third persons to enter into a contract of loan or the like with their company when the proposed contract was *ultra vires* the principal. (See *Richardson* v. *Williamson*, L. R. 6 Q. B. 276; *Weeks* v. *Propert*, L. R. 8 C. P. 427.) In *Firbank* v. *Humphreys* however the action was *not* brought in respect of the contract under which Firbank agreed to take the debenture stock in lieu of cash, but was brought in respect of a supposed warranty of the directors of their authority to issue the certificates under that contract. The Court of Appeal (Lord Esher M.R., Lindley and Lopes L.JJ.) held that the directors were liable for the difference between the value of the debentures which were in fact issued and genuine debentures of the company. I do not propose to refer again to the question of the measure of damages, but only the question of liability. It is obvious that unless it could be said that the directors by merely issuing the certificate warranted their authority to do so (using 'warranty' in the strict sense) the plaintiffs had no cause of action, as any mere representation by the directors was entirely innocent. The Court of Appeal however held that there could be a warranty apart from a contract, and that the decision in *Collen* v. *Wright* was applicable not only to cases where an agent had induced another person to enter into a *contract* by a misrepresentation of authority, but to all cases in which a person by innocently asserting that he has the authority of a principal induces another person to *enter into any*

transaction, meaning thereby *to do any act*[1]. This is a truly amazing decision. Put into plain English it amounts to this: that any one who innocently *states* that he is a duly authorized agent when he is not and thereby induces another person to act in any way to his detriment is liable to be sued in an action for damages. It must be borne in mind that in every case of an action for damages for misrepresentation the essence of the charge is that the plaintiff has been induced to act to his detriment by that which the defendant falsely represented to him. If that falsehood was wilful, he has a cause of action for damages. If innocent, he has no cause of action unless the representation amounted to a warranty strictly so called. In *Firbank* v. *Humphreys* the directors were only guilty at the most of an innocent misrepresentation, and it is not easy to see how it can be said that Firbank even *acted* upon it. Even if he did he had no cause of action.

In order to support the erroneous conclusions of law which Lord Esher came to in *Firbank* v. *Humphreys* he endeavoured to claim the authority of two cases, *Weeks* v. *Propert*, L. R. 8 C. P. 427, and *Dickson* v. *Reuter's Telegram Co.*, 3 C. P. D. 1, as establishing the proposition that 'the principle of *Collen* v. *Wright* extends further than the case of one person inducing another to enter into a contract.' There is nothing said in either of those cases, fairly considered, which supports any such proposition. In *Weeks* v. *Propert* (u. s.) the plaintiff was induced by directors to lend money to their company on an implied warranty that the debenture which secured it was valid, and the directors were held to be personally responsible for a breach of warranty. This is a breach of warranty of authority by an agent inducing a third person to enter into a *contract of loan* with his principal, and there is not a word said in the judgments in that case to extend the application of *Collen* v. *Wright*. In *Dickson* v. *Reuter's Telegram Co.* (to the judgment in which Lord Esher was a party) Bramwell L. J. uses this language:

'The general rule of law is clear that no action is maintainable for a mere statement although untrue and although acted on to the damage of the person to whom it is made unless that statement is false to the knowledge of the person making it. . . . *Collen* v. *Wright* establishes a separate and independent rule which *without using language rigorously accurate* may be thus stated. If a person requests and by asserting that he is clothed with the necessary authority induces another to enter into a negotiation with himself and a transaction with the person whose authority he represents that

[1] I doubt if any member of the Court of Appeal really held this except Lord Esher, although it seems to have been assumed in *Oliver* v. *Bank of England* that it was the judgment of the whole Court.

he has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into the transaction.'

In the same case Lord Esher says this of *Collen* v. *Wright*:

'I have come to the conclusion that the decision in that case was founded upon a different and independent rule, which may be stated to be that where a person either expressly or by his conduct invites another to negotiate with him upon the assertion that he is filling a certain character *and a contract is entered into upon that footing*, he is liable to an action if he does not fill that character.'

And Cotton L. J. says of *Collen* v. *Wright*:

'The principle of that case cannot apply here. The defendants did not enter into a contract with the plaintiffs, nor did they represent that they had any authority to act as agents for the plaintiffs' Liverpool house.... There being no contract between the parties to the present suit *Collen* v. *Wright* is distinguishable.'

In *Firbank* v. *Humphreys* and more particularly in *Oliver* v. *Bank of England* a single word used by Bramwell L. J. has been pounced upon by the Court as involving an extension of the doctrine of *Collen* v. *Wright*. That word is 'transaction.' It is clear to any one who wishes to ascertain the real meaning of Bramwell L. J., that by 'transaction' he meant 'contract' or 'contractual relation.' The agent, according to him, enters into a 'negotiation' with a third party by which that third party is induced to enter into a 'transaction' with his principal. If words have any meaning, what could such a transaction be but a contractual relation of some kind? If Bramwell L. J.'s words are not sufficiently clear by themselves, Lord Esher himself supplies the deficiency by expressly limiting the doctrine of *Collen* v. *Wright* to cases where 'a *contract* is entered into upon that footing.' If *Weeks* v. *Propert* and *Dickson* v. *Reuters Telegram Co.* are eliminated Lord Esher's decision in *Firbank* v. *Humphreys* is absolutely unsupported by authority.

Oliver v. *Bank of England* does not require so much examination because it is mainly based upon the previous decision of *Firbank* v. *Humphreys*.

In *Oliver* v. *Bank of England*, stockbrokers innocently acting upon a power of attorney which was forged, demanded of the Bank of England that they should in accordance with their statutory liability register a transfer of consols. The Bank did so and had to replace the consols in consequence. They then sued the stockbrokers for a breach of an implied warranty of authority, and it was held by the Court of Appeal on the authority of *Firbank* v. *Humphreys* that the stockbrokers were liable. In this case again it is submitted that the decision is clearly wrong, inasmuch as

there was no warranty by the stockbrokers. A warranty, as has been said over and over again, is a contract, not a mere statement, and it requires a consideration. Moreover whether express, or implied from conduct, it must be *intended* as a contract, or in other words it must not be a mere bit of gratuitous information or casual utterance, but must be seriously made as an inducement to the principal contract. In *Oliver* v. *Bank of England* the stockbrokers were not inviting the Bank of England to enter into a contractual relation at all. They were *demanding* of them to fulfil a duty imposed upon them by statute for the neglect of which they would have been liable to an action for damages. If the Bank had had an option in the matter, and the stockbrokers had gone to them and said: 'Please register this transfer, and if you will consent to do so we will warrant that it is genuine'; or 'we will warrant that we have authority to ask you to do so,' the principle of *Collen* v. *Wright* would have applied because the Bank would have consented at the request of the stockbrokers and upon their assurance to do something which they were otherwise not bound to do, or in other words they would have entered into a contractual relation with the stockbrokers or their principals for good consideration. As the facts stood, however, there was no contractual relation and no consideration and therefore no warranty. The Bank had no more cause of action against the stockbrokers than if they had innocently stated that the stockholder was alive when he was dead, or was a rich man when he was a poor man, or had made any other innocent misrepresentation upon the faith of which the Bank acted. It perhaps cannot be too often repeated that the mere making of an innocent misrepresentation or the invitation to act upon it gives no cause of action *per se*. The attempts by the Courts to reintroduce a liability at law for innocent misrepresentation are absolutely inveterate. It is perfectly amazing that it should have been necessary in the year 1889 for the House of Lords to solemnly lay down in *Derry* v. *Peek* that an innocent misrepresentation gave no cause of action. The same thing had been laid down over and over again by eminent judges for at least a century. Continually, however, the same tendency reasserts itself in the common law courts to try and make a person liable for a misstatement which, though innocent, has in fact been acted upon to the detriment of another. This is no doubt a highly moral and laudable view, and perhaps it is most charitable to assume that *Firbank* v. *Humphreys* is only another example of the same tendency. It may be remarked that Lindley L. J. in *Firbank* v. *Humphreys* endeavoured to justify the decision of the Court upon what, if in accordance with the facts, would have been a legal ground. He

says that the directors 'in effect requested Firbank not to insist upon payment in cash, and to go on with the work in consideration of receiving debenture stock' (p. 62). If this were so, then there may have been a warranty by the directors for good consideration. But it was not so, for at that time the rights of the parties were already ascertained by the supplemental contract, and the contractor had bound himself to accept debentures, and neither he nor the directors were aware that the debentures were not valid, and therefore there could not have been such a request as was suggested. The rule of *Collen* v. *Wright*, as laid down by Lindley L. J. in that case, is exactly in accordance with what we have been urging, viz.:

'Speaking generally an action for damages will not lie against a person who honestly makes a misrepresentation which misleads another. But to this general rule there is at least one well established exception, viz.: where an agent assumes an authority which he does not possess, and induces another *to deal with him* upon the faith that he has the authority which he assumes. The present case is within this exception.'

It is comforting to think that so great a master in the law is really in disagreement with the legal propositions laid down by Lord Esher in that case, and followed by the Court of Appeal in *Oliver* v. *Bank of England*, and that he acquiesced in the decision solely, so far as one can see, from a view of the facts which turns out to be erroneous. The words 'to deal with' used by Lord Lindley, just like Lord Bramwell's expression 'to enter into a transaction[1] with,' mean to enter into contractual relation with another if words have any meaning.

One word in conclusion. Lord Esher in *Firbank* v. *Humphreys* and Vaughan Williams L. J. in *Oliver* v. *Bank of England* seem to think that they add something to a legal discussion by saying that a person enters into a contract, or is induced to act 'as a matter of business.' It has been a favourite idea amongst judges, at all events since Lord Esher presided over the Appeal Court, to imagine that there is such a thing as a 'business' interpretation of legal rights and actions. Of course such an expression is mere nonsense. You might as well speak of a 'red' or 'green' or 'piano' or 'forte' interpretation of a contract as a 'business' interpretation of a contract. For legal purposes there is only one view of a contract or of the rights or liabilities which it entails, and that is the 'legal' view. If the lawyers would only make the strict legal view clear and certain, they can trust the business men to arrange their business documents and transactions accordingly. Nothing is

[1] It will not be forgotten that in French law 'transaction' means a compromise.

more pernicious to business than a lax legal interpretation of legal documents and acts in accordance with supposed 'business' ideas. The first principle of commercial law is 'certainty.' It would have been far better for the business world if the Courts of Common Law had adhered to what appears to have been their earlier view, and disregarded the very thin dividing line between cases in which a professing agent has no principal, and those in which he has a principal, who has not authorized the contract in question. It requires no greater strain on the legal conscience to swallow the one doctrine than the other, 'ut res magis valeat quam pereat,' and we should at least have had the agent's liability defined, limited to cases of contract and to cases where the principal himself would have been liable if he had authorized the contract.

FRANCIS R. Y. RADCLIFFE.

[Our learned contributor assumes that the decision of the House of Lords in *Derry* v. *Peek* was obviously right. He must forgive me for observing that it was not received with general acquiescence by the Equity Bar, and is not accepted, so far as I know, in the principal American jurisdictions. The question was not whether innocent misrepresentation is generally a cause of action, but whether a representation is innocent, being made in the course of business, and to be acted upon, when it is erroneous and misleading through ignorance of facts which it is one's business to know.—F. P.]

ENGLISH BOROUGH COURTS.

THE English borough courts may be looked at from many points of view. In any aspect they are interesting, but I shall at present be content in endeavouring to trace something of their relationship to the growth of commercial life, and the gradual development of means of communication and facilities for transport throughout the country. Other points may incidentally be touched upon, but this will be the main purpose.

The story of the borough courts is intertwined with the story of the towns themselves, and something must be said about the beginnings of trade in the towns. Trade has not generally been carried on except in places where there has been either a temporary or a permanent concentration of population. Before the Conquest the beginnings of trade were to be found in the boroughs, but it is necessary (even at the risk of repeating familiar facts) to impress the point that concentration of population in towns as we know it cannot be said to have commenced until after the Stuart period. At the end of that period no provincial centre of population (with the exception of Bristol, Norwich, York and Exeter) contained ten thousand inhabitants, and the majority of the then important towns had only about half that number. Throughout the Middle Ages most of the boroughs were what we should call mere villages. Care must be taken not to draw unwarranted inferences regarding the extent of their trade from the Anglo-Saxon laws confining buying and selling to towns. It is certainly true that even in the earliest times traders would collect in boroughs, because they there enjoyed an especial degree of protection; and in some cases the converse may also be true, namely, that places became boroughs because trade tended to centre on their site; but it must be remembered (and these are points which seem sometimes to be too lightly passed over) that the normal borough was too small a centre of population to have a continuous trade, that trade was done intermittently or at periodical intervals, and in early times mostly during temporary concentrations of population—concourses of buyers and sellers—which as often as not gathered outside, rather than inside, a town, drawing to themselves for the time all the activity of the neighbourhood, and causing a temporary discontinuance of all ordinary proceedings. These commercial concourses were of course

the fairs, and their practical monopoly of such commercial life as existed was one result of prevailing geographical conditions. When the Normans came the land was only partly reclaimed from its wild state, and was traversed by no lines of communication save Roman roads neglected and in disrepair. Periodical meetings to interchange commodities were a natural outcome of lack of facilities for frequent travelling between districts of production and of consumption, and fairs were common throughout Europe from a very early period. We see, then, that the holding of a fair reduced everything in the neighbourhood to a state of suspended animation. Whatever was done was done at the fair, and even the holding of the moot or court in the borough that lay within the circle affected was suspended. Thus in Leicester, which was very early a centre of population (having been one of the Five Boroughs of the Danes) and a place in whose history the commercial element was prominent, we find from a recital in a charter of 1277 that it had been customary for the borough court to be entirely suspended when the great fairs were held. The charter is, however, indicative of change. It provided 'that the courts be held and right done on those who are at home, and that those who are at the fairs be essoined [i. e. excused] by reason of the fairs.'

In these great fairs disputes would arise in course of bargaining that would have to be settled before the wayfaring traders went their several ways, and temporary courts for this purpose have existed in all fairs in England from the earliest times. In cases where the ordinary borough courts were not held during fair time their place would be taken by these tribunals. Only one example has yet been quoted, but there were others. Under a charter of Edward III (confirming and enlarging previous grants extending back to the time of the Conqueror) the Bishop of Winchester, as Lord of St. Giles' Fair, near that city, had the keys of the city given up to him at fair time, and he had 'cognisance of all pleas between the men and tenants of the city, and all other persons within a circuit of seven leagues round the fair, regarding breaches of law, debts, and all contracts whatsoever.' This fair 'closed the shops not only in Winchester, but also at Southampton, which was a capital trading town.' Other instances were at York and Hereford.

These fair courts have always been known in England as Courts of Piepowder (or Pie Poudre), and the expedition with which it was essential they should dispose of business had begun in the time of Edward IV to attract cases where they had not jurisdiction. The preamble to a statute of his reign incidentally sketches the constitution and jurisdiction of the Piepowder Courts, the jurisdiction

comprising strictly only cases arising in the particular fair then being held. We shall find that these courts continue to have a bearing on the subject, but we must now deal more closely with the ordinary town tribunals. As the towns gradually increased in size and facilities for travelling improved, trade tended to settle in the centres of population and the fairs began to decline, but the process was slow.

Every English town that has been of any importance has its own separate history. Common features there have been, but each centre of population was an individual unit that worked out its own destiny in its own way, and individual differences are accordingly to be found in the local courts, though, like the towns, certain courts had particular features in common. We should naturally expect, for example, to find in many places that procedure had been influenced by mercantile usage; but, in looking for these (or indeed any) peculiarities it must be remembered that law became a uniform system extending over the whole kingdom and controlled by a central authority much earlier in England than in most Teutonic countries. The effort to give the law a national character was consummated under Edward I, and, unlike the great trading communities of the continent, whose special laws exercised great influence in the development of national systems, the English chartered boroughs were comparatively 'of small importance; and they stood much in fear of the law of the land. It is doubtful if any royal judge in England would have accepted the maxim—Town's law breaks land's law[1],' although such a rule might be accepted on the continent. This will account for greater uniformity than might otherwise have been expected, but it is by no means to be understood that local differences were entirely blotted out. The common form of proclamation made by the civic authorities at the opening of a fair held by a town always included a declaration that justice would be administered in the court of the fair 'according to the law of the land *and the custom of the town*[2].' Moreover, there is at least one very marked peculiarity exhibited by certain borough courts, namely, the existence in them of the custom of foreign attachment, which must be put down as resulting from their special needs, and as a privilege they secured and retained though it never became part of the common law of the land.

The jurisdiction of the old borough courts was of course very limited territorially, but it was obviously desirable in the interests of the burgesses that limits of jurisdiction should interfere as little

[1] Law and Politics in the Middle Ages. By Edward Jenks. 1898.
[2] See Memoirs of Bartholomew Fair. By Henry Morley. 1859. And see form used at Newcastle, quoted below.

as possible with the taking of proceedings against non-resident merchants with whom dealings were carried on. This would appear to be the necessity that gave rise to the custom of foreign attachment, a procedure to which parallels are to be found in Roman law and in continental systems. Foreign attachment was 'an attachment of foreigners' goods, found within a liberty or city, for the satisfaction of some citizen to whom the foreigner is indebted; or of money in the hands of another person due to him against whom an action of debt is brought[1].' 'Foreign' means, in this connexion, simply outside the borough. Thus at Leominster there was the borough and 'the foreign,' the latter being within the jurisdiction of the manor, but not within the liberty of the bailiff of the borough; and at Walsall the local court was called 'The Court of Record for the Borough and Foreign of Walsall,' the two areas being co-extensive with the parish of Walsall. The word 'foreign' also formed part of the title of the courts at Colchester, Lincoln, and Great Grimsby, but it must not be assumed from this that foreign attachment necessarily existed in them. Indeed the only courts wherein the custom has prevailed to any extent have been those of London, Bristol and Exeter. In consequence of decisions in recent years limiting the extent to which the procedure can be made use of, suitors have not so frequently availed themselves of it, but it has in its time played an important part. Early examples of its use were quoted in the House of Lords cases of *Cox* v. *Mayor of London* (1867) and *Mayor of London* v. *Joint Stock Bank* (1881), but none referred to was so ancient as an example to be found in the Exeter records, which from the earliest times are remarkably perfect. A number of years ago they were arranged and calendared in consequence of reference to them having been found necessary in litigation in which the corporation was engaged[2], and the record of the proceedings in a case of foreign attachment in 1289–90 was then extracted from the Mayor's Court rolls. It appears that a merchant was attached in that court at the suit of the city officers for non-payment of town dues upon the importation of goods into the port. The proceedings are very quaint. 'David de la Hull [evidently a stranger] was attached on suspicion for withholding the custom of divers merchandise, and all his goods found were ordered to be attached until he should make satisfaction. He was attached by his horse, upon which he gave security, and, after the proceedings had lasted some time, he entered the liberty at the favour of the mayor and gave 40*s.*, and for his trespass against the liberty

[1] Jacob's Law Dictionary. 1756.

[2] The records have not been published, and I am indebted to the kindness of Mr. Geo. R. Shorto, the Town Clerk, for most of the particulars given in this article concerning the Exeter courts.

40*s*.' It must of course be borne in mind that 40*s*. in the old days was worth very much more in goods or labour than 40*s*. of our modern money.

Another curious case where foreign attachment was employed, this time at Bristol, is worth mentioning. The territorial limits of jurisdiction there include a certain portion of the Bristol Channel, and a ship was once attached under this procedure when twenty miles from the town itself. The captain, however, in contempt of the court, sailed away and carried the officer of the court to Jamaica. On his return the contempt was compromised.

We proceed to look at one or two individual examples of towns and their courts. Some places are more typical than others, and in choosing a community where the influence of the commercial element has been exemplified we could probably take no better instance than Bristol, which has been remarkable for the number of local jurisdictions exercised within it, and is an example of a town that has owed all its eminence to trade, having been 'for centuries the greatest purely trading town in the country.' Trade flowed to it largely on account of its geographical position, but, as we have seen, in the earliest times the fairs absorbed most of the trade, and it would be consistent with this that a place owing its standing almost wholly to commerce should be unimportant at first. Bristol itself had never been a Roman station, and, at the time of Domesday Book, it was only part of the royal manor of Barton. It had not then the distinguishing characteristics of the typical 'borough[1],' and we do not look for the usual borough court. The court for the hundred in which it was situated had to serve. The early charters speak of its 'hundred court,' but at the end of the reign of King John the town had a mayor, and in the time of Edward III two local courts had become well established. A charter granted in the forty-seventh year of his reign (1373) made the town a county of itself, and specified the extent of jurisdiction of the Mayor's Court, which was to continue as had been accustomed, but was not to have cognizance of 'the pleas which were accustomed to be holden in our court in the said town of Bristol called the Court of the Tolzey before the steward and other our officers in that place.' These are the two courts, and this is the first mention by its distinctive name—the Tolzey Court—of the tribunal which afterwards absorbed most of its companions. It is supposed that it was originally held before the bailiffs of the hundred, and that the reference to 'steward' in the charter designated the officers at first known in the town as provosts, but

[1] For these characteristics see Domesday Book and Beyond. By F. W. Maitland. 1897.

called from 1267 to 1310, stewards. This view seems more likely to be correct than another to the effect that the original court became united with that of the steward of the royal household. Bristol received royal visits, but no king ever resided there, and when, subsequently, Richard II granted that the steward, marshal and clerk of the market of the king's household should no longer sit or exercise their offices within the town, the court did not cease to exist, indicating that the royal steward was not connected with it. One clear inference from the name of the tribunal seems permissible. Tolls, we know, played a very important part in early trading, being often exacted in kind, and the Tolzey, or place where they were collected, was a gathering place of merchants. This was therefore a commercial court. Several leases of the town had been obtained, but Edward IV granted the town to the mayor and commonalty for ever (1461), and the Tolzey court then became annexed to the corporate jurisdiction. Both before and after this a contest for jurisdiction was carried on between the Mayor's and the Tolzey court. There was also a court of the Staple, but both it and the Mayor's court became quite disused. The mayor and sheriffs under Edward IV at once took the Tolzey court on themselves jointly with the bailiffs (which name had been substituted for steward). On the state of affairs at this period some light is thrown by the Mayor's Calendar[1], a book written by Robert Ricart, town clerk from 1479 to about 1508. The Tolzey seems then to have been more generally called the Compter, and it appears that the mayor held a common audience there where 'varyances' were 'set in rest,' but the references to this show that it was not a court, and the court itself may have been held at the Guildhall at that time. Certain items in the earliest corporate audit book (1532) show that the Tolzey was a room, but after 1550 a walk beneath a penthouse roof fixed against the wall of the new council house was the place known as the mayor's or civic Tolzey, and a merchants' Tolzey, or exchange, was built soon afterwards, the merchants having till then met in the open street. Under Henry VII the offices of sheriff and bailiff became united, and the court continued under the authority of the sheriff, being sometimes referred to as the Sheriff's court, but an official called assessor, who had long been attached to the court, came to be known as steward, and to preside as judge until, in 1835, the judgeships of borough courts were transferred to recorders.

Mention must be made of still another court whose business was absorbed by the Tolzey court. This was a Pie Poudre court. When

[1] The Maire of Bristowe Is Kalendar, by Robert Ricart. Edited by Lucy Toulmin Smith. 1872. (Camden Society.)

and how the two became amalgamated is not quite clear. The charter of Edward IV already referred to granted to the mayor and commonalty all fairs and markets in the town, and probably any courts of Pie Poudre then existing came (like the Tolzey court) under municipal control. The Mayor's Calendar speaks of a 'market court' held before one of the bailiffs. A charter of Charles II expressly granted a court of Pie Poudre, but it does not appear that that grant was ever acted upon. At all events the connexion between the two is very ancient, and for the last two hundred years at least they appear to have been practically one court. The ancient great fair of Bristol was held in July, but in the eighteenth century the time was altered to September. Latterly, the Pie Poudre court was held during a fair of fourteen days, commencing in September in a thoroughfare known as the Old Market. For this period the Tolzey court was suspended. This custom looks like a survival from the days when everything outside a fair came to a standstill till it was over. The Pie Poudre court was actually held till 1870 in a covered walk in front of the 'Stag and Hounds,' but adherence to ancient ceremony involved the consumption of undue quantities of liquor, and the affair was suppressed. The court has since existed only as a name forming part of the full title of the Tolzey court. Nowadays one of the serjeants-at-mace simply announces the holding of the court at the appointed time and place, and immediately adjourns it into the Tolzey, but even at the present time writs issued during the fortnight of nominal fair time have the words 'held in the Old Market' added to the ordinary title of the Tolzey court.

The Tolzey court thus became the sole local tribunal, except for courts of request and conscience (established in Bristol as elsewhere), and their successors the modern county court; and it still exists as an active institution disposing of a fair amount of business. It is one of the very few local courts to which the modern procedure under the Judicature Acts has been applied, and this has a great deal to do with its survival. The practice is similar to that of the High Court, but actions for any amount, large or small, can be entertained, and a peculiar feature is that there is no appeal from the judge's decision[1]. The application of the Judicature Rules has left untouched many special features, and a work published half a century ago[2] is still the authority on many points of practice. One point of particular interest may be noted, namely, that the

[1] This has been the commonly accepted opinion, but it would appear from the recent decision in *Darlow* v. *Shuttleworth*, [1902] 1 K. B. 721, that an appeal lies to the King's Bench Division from every inferior court of record of civil jurisdiction when there is no statute regulating the appeal.

[2] Practice and Pleading in the Tolzey Court of Bristol. By Edward Clarke. 1849.

special form here assumed by the procedure of foreign attachment preserves unchanged the Anglo-Saxon practice of compurgation. In the event of the property sought to be attached being goods a levy is made, and on 'the attachment being returned, the plaintiff has a right to file his declaration, in the form of the *concessit solvere*, on the fifth court day exclusive of the day of the return, and at the next court the plaintiff's attorney proves the debt upon oath, and according to the form of the court, two persons appear as pledges, and swear they believe he has spoken truly; he then moves for a judgment against such goods and a warrant of appraisement[1].' This continuity of procedure from the earliest times is very interesting historically, but of course, in modern practice, the two compurgators, or oath-helpers, are simply a couple of officers of the court whose swearing is a mere formality[2].

Several registers or books of record were kept by the corporation of Bristol for entries relating to the government and trade of the town, and the earliest of these (kept during the fourteenth and fifteenth centuries) has been printed[3]. The entries commence in 1344, but mostly have not much bearing on the present subject. One, however, entitled Lex Mercatoria, consists of a treatise on the laws affecting merchants, written in Latin in twenty-one chapters, and is an interesting evidence of the commercial importance of the place at the time. So also are two other entries, one a copy of the shipping code known as the Laws of Oleron, and the other a statement of the jurisdiction of the Admiralty.

Bristol, among its other courts, had a local Admiralty Court under charters from Henry IV and Edward IV. It appears that the Court of Admiralty assumed jurisdiction over divers matters which did not belong to it, and that this was a grievance in many places, Bristol being particularly affected. A petition was therefore sent to the king, praying that on account of the delays and costs of the civil law (by which the Admiralty Court was then regulated) parties might be allowed to have their remedy at common law. The charter exempting Bristol from the jurisdiction of the Admiralty was the result. The privilege was highly prized, and an attempt to abrogate it once successfully resisted, but by the eighteenth century the right had for some time ceased to be of value, and had been tacitly surrendered.

[1] Practice and Pleading in the Tolzey Court of Bristol, p. 27.

[2] No complete account of the Tolzey Court seems to exist—only scattered references. See the Bristol Charters, by Rev. S. Seyer, 1812; Report of Municipal Corporation Commissioners, 1835; the Annals of Bristol, by John Latimer, &c., &c. I have to thank Mr. Latimer personally for information that was most useful in piecing together the account given above.

[3] The Little Red Book of Bristol. Edited by F. B. Bickley. 2 vols. 1900. It is understood that other volumes will be published in course of time. [Cp. Dr. A. T. Carter in L. Q. R. xvii. 237, 246.]

It is curious that the court in Bristol and the court in Norwich—the two provincial towns which, during the later Middle Ages, stood far ahead of all others as centres of trade—are practically the only examples of such tribunals being known by the name of the place where the court sat. Courts of Record, of Pleas or Portmote, Mayor's courts and others were numerous, but Bristol had the only Tolzey court, and (excepting King's Lynn in Norfolk) Norwich was the only place where 'Guildhall Court' was the recognized name of the local tribunal[1]. This may be mere coincidence, but it seems only natural that the Tolzey and the Guildhall should have greater comparative importance and bulk more largely in the public eye in the places of the greater trade.

The municipal records of Leicester have recently been published[2], but it appears that, though most of the old documents have been carefully cherished, the records of the borough court, known as the Portmanmoot, have been almost totally lost. Only a few have been preserved, the earliest being an undated roll believed to belong to about 1260. Though only short it includes pleas of debt, trespass, unjust distraint, assault, and refusal to warrant possession. Two cases relating to damage to trees are mentioned. There is also preserved a charter dated 1277 for reforming the procedure of the Portmanmoot, already referred to as evidencing the suspension of town business during fair time. A hundred years after this the Portmanmoot was sitting weekly. Another court—the court of the merchant gild—had developed alongside the older tribunal, but many of their functions were then passing to other institutions. In the Portmanmoot, however, conveyances continued to be recorded and debts recovered. The town strove to keep business in its own courts. Several times during the fifteenth century town ordinances were passed imposing severe penalties on any who should bring actions elsewhere when they might have brought them in the local court. This jealousy existed through a desire that the profits accruing from goods being forfeited in the court might not be lost to the town. The attitude of Leicester was not exceptional, there being record of similar ordinances at a later period in Bristol. The Leicester borough court, however, like many another institution, came to the days of its decline, and the opening of the nineteenth century found it verging on disuse.

Exeter is a city whose local courts are very interesting. The place has had a continuous existence since the days when a British

[1] The one instance of King's Lynn is the only exception in the list of nearly two hundred courts given in Appendix H to Fourth Report of Common Law Commissioners, 1832.

[2] Records of the Borough of Leicester. Edited by Mary Bateson. 2 vols. 1899 and 1901.

settlement occupied its site, and the municipal records from the earliest times are, as we have seen, remarkably perfect, though remaining unpublished. The city court has become almost, if not quite, disused, owing to being hampered with old procedure under the Common Law Procedure Acts. Some years ago the citizens made an attempt to obtain an Order in Council applying the provisions of the Judicature Acts, but were unsuccessful. The tribunal is called 'The Provost Court of the City of Exeter,' and the history of the title is interesting. It appears that from the time of the Conquest until the second year of the reign of John the chief officer of the city was called Wic-reeve, Port-reeve, Prae-positus, Provost. The first mayor was elected in 1200, and he was assisted by two officers called provosts. This arrangement continued until 1258, when the number was increased to four, one of whom was to be appointed receiver for the corporation. The name 'provost' was afterwards changed to steward, but the court of the provosts, in which the mayor presided, has retained the name of the Provost Court ever since. Except in Exeter the name 'provost' is not now found in use in English municipalities, though in early times it was not uncommon, and there were also 'prévôts' in France. The name is of course still current in Scotland.

The Mayor's Court of Exeter has already been referred to in speaking of foreign attachment. It has long been obsolete, but the rolls of the court from 1263 are among the city records. It was once a court of record where almost everything was done that was done in the courts at Westminster. The proceedings in the Provost court were enrolled upon the records of the Mayor's court until 1308, from which date the proceedings were recorded upon separate rolls down to 1700. There are also books in which the proceedings in the Provost court are recorded from 1507 to the present time. A thorough examination of these records would doubtless reveal many instructive facts, but, as they are very voluminous, that would be a heavy undertaking. The present procedure of the Provost court retains no special feature except the custom of foreign attachment.

These particulars of the courts in Bristol, Leicester, and Exeter will serve to indicate some of the salient features to be found in the histories of similar tribunals throughout the country. No mention has been made of criminal jurisdiction, but it was exercised in some boroughs, and there are many other points on which much might be said. Certain exceptional local courts, such as those of Liverpool and Salford, still dispose of much business, but, apart from these, the day both of fair and borough courts is past, however interesting they may be historically. The fairs had retained

considerable importance until the Stuart period, but they were then declining. The modern concentration of population was commencing, and from that period also dates the introduction of the turnpike system, under which the country, till then almost without means for wheeled vehicles to travel, was covered with a network of roads. Within two hundred years from the passing of the first Turnpike Act in 1663, some 30,000 miles of turnpike road were constructed, and the improvement in transport facilities thus effected was the deathblow to the fairs. With them went their Piepowder courts[1], and it may be doubted whether such a court is now held anywhere in England. It appears that one survived until recently at Hemel Hampstead, which was incorporated in 1359 in order that the body corporate might hold a fair. Latterly its bailiff and jury had little judicial work to do, and when the town was re-incorporated in 1898 the court was not continued, though it had been held till then. It was probably the last of its kind to survive. Many fairs came under municipal control, and this would tend to terminate the separate existence of the Piepowder courts. The court of fairs at Leicester appears to have become a burghal court in the fourteenth century, and we have seen how the same thing occurred at Bristol. At Cambridge, too, the court of Sturbridge Fair was held before the mayor and bailiffs of the town. The courts of the London fairs disappeared with the fairs themselves. The longest to survive was Bartholomew Fair, which did not finally cease till 1855. Its court sat to the last in Cloth Fair, being held in the 'Hand and Shears' public house. Although courts of Piepowder are extinct, the custom is kept up to this day at Newcastle-upon-Tyne at the Lammas Fair, and also at the St. Luke's Fair, of making public proclamation with considerable ceremony, in the presence of the mayor and town clerk of the opening of the fair, and 'that a Court of Piepowder will be holden during the time of this fair, that is to say one in the forenoon, another in the afternoon, where rich and poor may have justice administered to them according to the law of the land and the custom of this town. God save the King.' Notwithstanding the proclamation no court is in fact held.

It is needless to repeat here the reasons for the decay of the borough courts to be found in the Report of the Municipal Corporation Commissioners. Close upon two hundred of these courts have flourished at various times in England and Wales. Many are of most ancient origin, but others owe their existence to royal charters granted in some cases as late as the time of George III,

[1] See, as to these courts generally, The Law of Markets and Fairs, by Pease and Chitty. 1899.

and, remembering how some places were made boroughs simply to control the parliamentary majority, we are not surprised to find borough courts in unimportant places, and in a condition of never having had any business worth speaking of. Neither disfranchisement nor mere non-user extinguishes a court, so these continue a nominal existence. Those of the borough courts which remain now in active operation are, however, generally tribunals of immemorial foundation. Their continuance diminishes the uniformity of our modern system of administering justice, but they have often served a useful purpose even in recent times in some of the larger towns, and one may doubt the wisdom of the policy pursued in recent years in several instances by the central authorities of throwing obstacles in the way where local feeling desired revival and modernising of procedure so that a borough court might again be brought into frequent use.

SANFORD D. COLE.

THE ENGLISH LAW OF DEFAMATION.

Part II.

AS to the Year Books: between 1327 and 1547, from the first year of the reign of Edward the Third to the last year of Henry the Eighth, during a space of two hundred and twenty years, we have in all ten cases in defamation, one in the time of Edward the Third, three under Edward the Fourth, one under Henry the Seventh, five under Henry the Eighth. And this even perhaps looks better than it is, if we accept the surer interpretation of those forerunners of Fisher, the ancient Abridgements.

Statham's is the eldest, and he need not detain us long. He does not even mention the Action sur le cas pur parolx. Statham appeared in 1498. Fitzherbert is the next, having been published by Richard Tottell in 1563. For him likewise there was no action on the case for defamation. Le Graund Abridgement of Sir Harry Brooke appeared in 1573. Under the general head 'Action sur le cas' he has two paragraphs *in hac re*:—

'Nota per Fitzherbert and Shelley que action sur le cas ne gist at common law for calling a man hereticke or advowterer; but in the Spiritual Court: but for calling him traitour or felon action lies at common law: but in the other case those of the Common Law Court cannot discuss what is heresy or advowtry: but for calling one Bawd action lies in both Courts.'

The second paragraph states that action would lie for calling one 'theefe.'

Thus even from the very first the Courts of Common Law frowned on their bantling tort.

The fear of breaches of the peace if men were left all remediless procured concessions of a sort, but the Bumbles of Royal Justice gave their waif but meagre diet. They restricted the courses. The history of the tort in the reigns of Elizabeth, James and Charles, the first of the names, is the history of the judicial effort to starve reputation on the irreducible minimum of remedy that would suffice to keep it alive. It was the age of the tyranny which called itself temporal loss. We have the cases set forth in Roll's Digest,

published in 1668, and fifty and three of the pages are taken up with the tort, but mostly tending as aforesaid, rather than to the saner policy of the Roman system.

If one says to a man, 'Thou art a Leno,' or to a woman, 'Thou art a Meretrix,' 'nul action gist pur ceo, que ceo est merement spiritual sans aucun temporal perde' (*Matthew and Croze*, 11 Jac.). But Ann Davis lost her marriage, and so in her action against her traducer recovered damages. 'Uncor le perder del mariage est temporal, et pur ceo l'action gist pur ceux parolls.' *Matthew and Croze* was brought by a man who by reason of the slander lost his marriage. He recovered its value as the measure of his damages, 'car nest ascun difference enter un home et un feme quant a ceo.' But the temporal damage must be there: if not, however gross the slander may be, 'nul action gist.' 'Thou bold Cullobine bastard-bearing whore; thou didst throw thy bastard into the dock.' There was no lost marriage alleged here, the plaintiff merely ran the risk of a prosecution for the alleged offence of bearing an illegitimate child. Cullobine, by the way, was the name of the plaintiff, at that time decently married, not a weird term of seventeenth-century abuse.

The judiciary played their tug of war with reputations, now giving a little, now taking much. 'Thou hast forsworn thyself in Leake Court.' 'No action lies without showing what manner of Court this is; for it cannot be intended or known whether this be such a Court as can compel one to swear or not' (Mic. 8 Jac.). 'He did forswear me forty shillings worth of tithes in Canterbury Court.' No action, because there are divers Courts in Canterbury (*Bray and Partridge*, Pasch. 43 Eliz. B. R.). Sometimes their niggardly rulings roused the protest of the Digesters themselves. 'Thou wast forsworne in thine answer in the Chancery.' An anonymous case tried in Hill, 41 Eliz. No action lies. 'Semble ceo nest ley' is Rolle's comment hereon.

The judiciary discovered strange principles in the Common Law; what they call Mitior Sensus is one of them, and in its name were many martyrdoms committed. To call a man bastard is actionable, 'car ceo tend a son disinheritance.' But to call him base-born is not. And this, whatever the grossness of the innuendo, 'car ceux parolls prise in mitiori sensu ne sont actionables.' And in this sort of case the plaintiff must have already taken the estate title to which is involved, otherwise there is no action. 'Pur ceo qu'il nad ascun prejudice par ceo uncore.' General words nearly always seemed to admit of the Beneficium Mitioris Sensus. 'Thou art a scurvy bad fellow, and deservest to be hanged,' 'You are no true subject to the King.' No action in either case. Not less remark-

able is the fine acumen of their discriminations. Weston said of Grey, a man of trade, 'Thou art a bankrupt knave.' 'Here,' says the judgment, 'bankrupt is not an adjective but a substantive, and knave another substantive.' Their verdict for the plaintiff might have rested on better grounds. But when one Perkins said of a merchant 'Thou art a bankruptly knave,' the merchant sued in vain. 'For it shall be intended that bankruptly is bankruptlike.'

The slanders might have been writs, so precise were the judges in their construction. 'He is in Warwick Gaol for stealing of a mare and other beasts.' No action, for the words are uncertain. And the imputation must be of a presently existing vileness. 'J. S. was a debaucht man, and was not fit to be a justice of the peace.' No action, because it related to a time past. And they were likewise unfavourable, if in their judicial construction of the slander they could detect what they termed a repugnancy. 'Thou hast stollen my goods, my plow stuff,' said a married virago. 'Nul action gist, car le feme covert ne poet aver biens.' Not even lawyers could prevail upon them as plaintiffs. 'He is a common maintainer of suits.' The innuendo is obvious, but yet, 'No action, for this is no discredit; for it is his profession to maintain suits.' As also with the following:—'Thou sayest thou art an Attorney. But I think thou art but an Attorney's Clerk. And if thou be, I will have thee pricked over the bar the next Term.' But a certain Councillor of the North was more fortunate. 'Thou art a Daffa-down-dilly' were the words he complained of. 'Action gist ove averment que les parolls signifie que il est un Ambidexter.'

During the period covered by these three reigns, the bulk of litigation concerned with slander was simply immense, and it was perhaps this very thing which in part biassed the judges against the encouragement of such suits. Coke himself shows his prejudice against them and complains of their frequency in *Crofts* v. *Brown*, a case already cited. 'We will not,' he says, 'give more favour unto actions upon the case for words than of necessity we ought to, where words are not apparently scandalous, these actions being now too frequent; but they were not so in former times, for from 1 Edward III until 5 Edward III there are not three actions on the case for slanderous words.' A glance at the Index of Sir Henry Yelverton's Reports sufficiently proves the frequency. It is a small folio of 220 pages, and covers cases in the Queen's and King's Bench during 44 & 45 Eliz. and 1 to 10 James I. Yet the Index contains two titles only that exceed Slander in length, and these only by five lines at the most. They are Pleder and Assumpsit.

By the end of this period the law had become thus early stereotyped, and the slight further changes down to the time of the next

of the great Digesters were in the direction of further petrification. It remains to trace the rise of the dichotomy between slander and libel, and thus account for its existence. For the reasons are historical. The distinction is the lineal descendant of another and earlier difference—the parent was introduced into England when Kings Edward the First and Richard the Second made fine white meat of the great men of the realm, and very contemptible red herring of their common lieges. For the offence dealt with by these Statutes de Scandalis Magnatum was that of political slander, whether written by a Langland or merely spoken.

The offence was justiciable in the Star Chamber, or that at least seems to be the plain meaning of the quotation from Crompton's book quoted supra. And this cognizance of slander considered as a political and criminal offence was confirmed, and, as to particular cases, extended by Statutes subsequent to 12 Ric. II. Thus by an Act of Attainder of 25 Henry VIII, Elizabeth Barton of Kent and others were convicted of treason for that they conspired to impugn and slander the divorce of the King and Queen Catherine, and the marriage between him and his second wife, Anne Boleyn. Likewise with an Act of 28 Henry VIII for a similar offence with regard to the Seymour marriage.

1 Philip & Mary, c. 5, gives to Justices of the Peace powers under an extension of previous Statutes de Scandalis Magnatum thereby made, power to punish by fine and pillory and loss of ears the offence of slander of magnate. This Statute is re-enacted and confirmed by 1 Eliz., c. 6. 5 Eliz., c. 15, makes false prophecy on the occasion of rebellion penal, justiciable by Justices of the Peace, but prescribes the offence in six months. 23 Eliz., c. 2, is declaratory of this. 13 Charles II, c. 2, makes it treason to say or write that the King is a Papist, or desires or attempts to introduce the Papacy.

It is not difficult to see why the Star Chamber took, as it did, cognizance of ordinary, i.e. non-political, slander. For the man who was a simple gentleman, neither very exalted nor very low, for a long time the duel was the means of character vindication. The Star Chamber forbade duels and the sending of challenges (Coke, Institutes, III. 157–8). Its provisions were most stringent against such breaches of the peace. If the combat were not fatal it was punished by censure, fine, imprisonment, and the being bound over to keep the peace. But the Star Chamber was nothing if not logical, and could see that it was of little profit to forbid the thing and find no substitute. It was warned by the words of Tacitus, 'In civitate nostra et vetabitur semper et retinebitur.' Therefore it took cognizance of political and non-political slander.

But all things considered the duel had a sufficient *raison d'être*, and so enlightened a mind as Bentham's even could see this. In his Introduction to the Principles of Morals and Legislation (1789) he expounds the absurdity of duelling considered as a branch of penal justice, and its inefficiency as a punishment. But he parts company with Paley, and proceeds to show that duelling does rudely and imperfectly correct and redress a social evil. 'It certainly effaces a blow which an insult imprints on the honour. Vulgar moralists by condemning popular opinion on this point only confirm the fact.'

He then points out the true remedy of the evil. It is to extend the same legal protection to offences against the honour as to offences against the person. The legal satisfactions which he suggests are some of them extremely grotesque. Thus, for an insult to a woman, the man is to be dressed in woman's clothes, and the retort should be inflicted by the hand of a woman. But the principle indicated is a sound one; that in an offence against honour the punishment must be analogous to the injury. That punishment would have met with Bentham's commendation which was inflicted on the Knight 'qui fuit order de chivaucher circa Westminster Hall ove son face al taile de chival.' Crompton, Jurisdiction of Courts, p. 33.

But in addition to, first, its cognizance of political slander, second of non-political (*teste* the above quoted cases), the Star Chamber took unto itself the cognizance of a new source of annoyance for despotic governments and the Law of Libel. It was not yet a hundred years since William Caxton had set up his Press in Westminster, but the English Renaissance had made the attacks of sturdy and bitter Pamphleteers a menace to the free continuance of Personal Monarchy. This potentiality of illimitable diffusion of seditious doctrine rendered the old law inadequate to cope with it; and the Star Chamber Committee cast about for some parallel law ready made to their hands which they might gloss and publish anew for English obedience: or in default to devise a new weapon altogether.

Here the composition of the Council is important, and no dubieties as to the true history of the Court can affect the present argument. The Act of 3 Henry VII constituted a Court, whether the very Star Chamber or not, in which several official personages sat together as a Court of Criminal Equity. These persons were the Chancellor, Treasurer, Lord Privy Seal, a Bishop, a Temporal Lord, and the two Chief Justices, or in their absence two other judges as assistants. 21 Henry VIII, c. 20 added the President of the Privy Council. Apparently these Chief Justices are those

spoken of by Holt as the Principal Justices of the Realm. Of these constituent persons some at least must have had a more or less extended acquaintance with the Corpus Juris; considering that the Florentine edition of the Pandects was a work of importance enough to bear on its title-page that it was published 'cum privilegio' inter alios 'Edwardi Sexti Angliae Regis.' The Roman Law afforded two sets of provisions that might have applied: the milder law of Injuria, and the more ruthless provisions of the Libellus Famosus. The Court of Star Chamber chose the latter, and the new law is set forth in the case de Famosis Libellis of 3 Jac. as reported by Coke, and in an entire chapter of Hudson's Treatise on the Court.

Of the criminal prosecutions by this Court little need be said; the cases of Prynne, Bastick and others are too well known. But to punish those offenders merely who came into their drag net, wide as it was as to mouth and small as to mesh, was not enough for them. These offences must be cut off in their infancy and sooner; so in Stewart times we get the tyrannous excess which led to the downfall of the Court which so exercised it. On the eleventh day of July, 1637 was passed the Decree of the Star Chamber concerning Printing. This document contains thirty-three clauses, and it may be seen *in extenso* in Arber's reprint of Milton's Areopagitica. The last article, by the way, is interesting as reciting the agreement between Sir Thomas Bodley and the Officials of the Stationers' Company, that one copy of every new book shall be sent to Oxford for use in the Public Library there. And though the Court of Star Chamber was abolished in 1640, the system of licensing introduced as above survived, being to a large extent republished as an Ordinance of the Lords and Commons in 1643.

Thus then we have a tribunal of which judges of the Common Law Courts were constituent members, which drew a real distinction between spoken and written defamation of a political kind. When and how did this dichotomy become civil? It seems to synchronize with the decay of the Licensing Acts. An Act was passed in 1662 reviving the Office of Press Licenser. It expired in 1679. It was revived again twice, but finally lapsed in 1694. The Star Chamber then had gone, Press Licensing was waning. How were those non-political, non-criminal libels to be restrained if men no longer had the vindication of the duel? The difficulty was met by the creation of a new tort, Written Slander; and the doctrine of implied malice or malice in law was imported into it by judges who were acquainted with the traditions, at least, if not the very practice of Star Chamber jurisdiction.

To sum up the arguments, then, proving that the germ of the

dichotomy familiar to us is to be found in the Statutes de Scandalis Magnatum. The gist of that offence was political; libels were political offences, and being printed with their wider circulation boasted a superior degree of criminality. The line between the tort and the crime varies at different times with the same systems. What more easy, or under the circumstances, what so inevitable as to shift libel from the criminal to the civil side of the line? Civil slander had co-existed with the Star Chamber in the Courts of Common Law, and there was no need to depart from the traditional habit of judicial disfavour. Libel was new to judges: once having admitted it as a tort, they dowered it with all the generous comprehensiveness that the dead jurisdiction had applied to the crime.

The first case which tends to establish the dichotomy is *Lake* v. *King*, tried in the King's Bench, 22 Charles II, 1670. There are a few earlier cases in which the slander was written, but on no occasion was this regarded as an aggravation of the offence, or a title to a remedy if the written matter did not come within the then recognized and stereotyped exceptions.

Boughton v. *the Bishop of Coventry and Lichfield.* Reported in Anderson, i. p. 119. Boughton brought action on the case against the Bishop, stating that he, Boughton, was a Justice of the Peace for the county of Warwickshire.

'Et que le defendant endevorant lui de infamer le Plaintiff, escry ceux parolls en English: "The said Edward is a vermin in the Commonwealth, a false and corrupt man, a Hypocrite in the House of God, a false brother amongst us, and useth very corrupt practices to accomplish his will; he indicted my register of Extortion wherein he hath used such privy and indirect shifts, etc."'

Verdict found for the plaintiff, and two matters were urged in arrest of judgment . . . that the words written were not sufficient to maintain the action. The Court refused to allow a stay of judgment on the ground that 'divers de ceux parolx queux sont devan mencyons touche luy esteant Justice,' 'car tiel person est oustermement unmeet d'estre Justice, et d'aver tel Office.' The justices of the Queen's Bench could not agree, and the justices of the other Courts were assembled at Serjeants' Inn, where judgment was given for the plaintiff with two dissentients.

In Anderson's report four other cases are cited, but only one, *Lord Lumley* v. *Ford*, concerns the present argument. Action herein was brought 'pur escryer de ceux parols I have learned of sundry persons by report your unchristian, lamentable and doleful dealing with me by stealth, as it were behind my back to bereave me not only of my good name and fame, but also of my life, lands, goods and liberty.' Judgment was suspended, but finally given for the

plaintiff for the amount claimed, one thousand marks. No innuendo is set forth here, but presumably it was of larceny. This is an early case, and was tried 10 Eliz. Rot. 221. In *Buckley* v. *Wood* the plaintiff recovered damages for a slanderous Bill exhibited in the Star Chamber. But judgment was reversed on proceedings in error, and it was held that the action was repelled by privilege. 22 Eliz. Rot. 561 (Anderson, ii. 28).

Doggate and Lawry, Croke, Jac. 190. The defendant here charged the plaintiff with felony, and exhibited a Bill of Indictment at the general Gaol Delivery for the county of Devon, whereby he was greatly damnified, &c.

Weston v. *Dobniet*, Croke, Jac. 432. The title here affords a curious sample of how case names may be corrupted. It is cited in Rolle's under the title of Westover and Daubigny. Suit in the Spiritual Court between one *A* and the present defendant, in which the present plaintiff was cited as a witness. The defendant in the previous suit put his exceptions to the witnesses into writing. 'That the now plaintiff was not a competent witness, and that there ought not any credit to be given unto him, because he was perjured.' Held, that the action was not maintainable because it is in course of justice and not *ex malitia*.

In *King* v. *Lake* the plaintiff, a barrister, brought an action on the case for publishing a libel in which he was defamed, &c. The publication was in delivering several printed papers wherein the plaintiff was slandered to several members of a Committee of the House of Commons. Jones:—

'It is true if a man make a complaint in a legal way no action lieth against him for taking that course if it be in a competent Court. But that that we say is not lawful in this cause is his causing the matter to be printed and published: agreeable to this cause are the common cases of letters: if a man will write a scandalous letter, and deliver it to the party himself, this is no slander. But if he acquaints a third party with it, an action will lie. So here, since he will publish this matter by printing it, or if he had but written it, it might have been actionable: for the members ought not to be prepossessed.'

It appears by Skinner 124 that the judgment in *King* v. *Lake* was affirmed in error.

In *Harman* v. *Delany* (Fitzgibbon, 254) the judgment says:—'Words published in writing will be actionable (though not so when barely spoken) which would not be so from a bare speaking of the said words, because libel perpetuates and disperses the scandal.'

Austin v. *Culpepper*, 2 Shower, 313, was tried in 1683, and forms another in what is now becoming a series of cases establishing the

new tort (or exception). This case is also reported in Skinner, 123. 'To say of anybody that he is a dishonest man is not actionable, but to publish it so, or to put it upon posts is actionable.'

Villars v. *Monsley*, 2 Wilson, 403, was an action on the case for publishing a libel on the plaintiff in the following words:

> 'Old Villars, so strongly of brimstone you smell
> As if not long since you had got out of Hell,
> But this damnable smell I no longer can bear,
> Therefore I desire you will no more come here;
> You old stinking old nasty old itchy old toad
> If you come any more you shall pay for your board;
> You'll therefore take this as a warning from me,
> Nevermore enter the doors while they belong to J.P.'

The case was tried before four judges, Wilmot C.J., and Clive, Bathurst, and Gould JJ. The Chief Justice upheld the judgment of the Court below on the ground of the noisomeness of the alleged disorder, and Clive agreed with him. Bathurst finished his judgment with the following words:

'I repeat it that I wish that there were some more solemn determination that the writing and publishing anything which tends to make a man ridiculous or infamous ought to be punished; for saying that a man has the itch without more, perhaps an action would not lie without other malevolent circumstances.'

Gould said:—'For speaking the words rogue and rascal of any one, action would not lie; but if these words were written and published of any one, I doubt not an action would lie.'

This case was tried in 1769.

The question was finally set at rest by *Thorley* v. *Lord Kerry*, tried in the Court of Exchequer Chamber, 1812; 4 Taunton, 355; 13 R. R. 626. The judgment of the Court of First Instance was here affirmed in error, and judgment was delivered by Lord Mansfield, who apparently strongly disapproved of the dichotomy, but felt himself powerless to decide against a stream of authority which had continued since the times of Chief Baron Hale until his own day. He accepted the authority of Comyn's Digest, which sub tit. Libel reproduced the distinction, and opined therefrom that as the Digester put it without any query he too was bound to recognize it.

It is to be noted, however, that Barnewall, who appeared for the plaintiff in error (the defendant in the Court below), seems, according to the report, to have been wrong in saying that Comyns was treating the distinction from the criminal point of view. This contention is at least open to doubt when it is remembered that under the same head Comyns cites *Villars and Monsley* as being an authority for the dichotomy. This case was certainly not criminal.

Mansfield concluded his judgment in the following words:—

'I do not now recapitulate the cases, but we cannot in opposition to them venture to lay down at this day that no action can be maintained for words written for which an action could not be maintained if they were spoken. . . . If the matter were for the first time to be decided at this day, I should have no hesitation in saying that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken.'

As against the last sentence, *Jones* v. *Hearn* is interesting, as also in that it well instances the see-saw tendencies of judges herein. This case was tried in 1759, and is reported in Wilson, ii. p. 87. Action of slander for these words:—'You are a rogue, and I will prove you a rogue, for you forged my name.' No special damage was laid in the declaration. There was a verdict for the plaintiff upon 'Not guilty' pleaded, and it was now moved by Serjeant Nares, in arrest of judgment, that these words were not actionable; to prove which, he cited a case from Leon, p. 231, pl. 313, where the words, 'Thou hast forged my hand' were held not actionable. But this case is overruled in 3 Leon. The judgment of the Court was delivered by Willes C. J., who said *inter alia*:—'If it was now *res integra* I should now hold that calling a man a rogue or a woman a whore in public company were actionable.' *O si sic omnes!*

But for the evident and opposite bias of the two judges it might fairly be thought that Lord Mansfield moulded on this dictum of the Lord Chief Justice the concluding sentence of his own judgment in the previously quoted case.

The new tort, then, Minerva-like and full panoplied from the day of its birth, was exempt from all vicissitudes of its stunted companion, and so of subsequent history it has but little. And that little relates to Procedure. Fox's Libel Act, 32 Geo. III, c. 60, gave to juries in indictments for libel power to decide whether the libellous words complained of were so in fact or not. Bayliss and Lawrence, however, decided that what had hitherto been the rule in criminal causes was henceforth to be applied to civil. Baron Parke, in *Parmiter* v. *Copeland*, stated the practice by saying that it had long been the practice of judges in civil as well as in criminal cases to define the offence of libel, and then to leave it to the jury to determine the question of fact whether the words complained of in the suit were actually defamatory or no. A salutary safeguard, considering the facility with which some excited litigants are wont to regard their personal honour as impugned. But it is still a question of law, one for the decision of the Court whether the words com-

plained of are patient of a defamatory meaning. Then of course it is for the jury to say whether the words so patient do actually under the circumstances bear that signification.

Lord Campbell's Act allows that due weight may be given in mitigation of damages, to the fact that an apology has been offered, and to payment into court with apology when the action is brought for matter that has appeared in a public print. 3 & 4 Vict., c. 9 provides that the publication of any papers, reports, votes, &c., of either House of Parliament by the order or under the authority of that House is absolutely privileged, and the protection extends to the republication and abridgments of or extracts from the same.

21 James I, c. 16 regulates the limitation of the action on the case for words actionable *per se*. It must be brought within two years. In libel it is six years. The sixth section of the same Act provided that in actions on the case for words the costs were not to be more than the damages if the latter were less than forty shillings. An Act of 3 & 4 Vict. provides that in this case no costs at all were to be given.

This tort is cognizable in the High Court only; the various Statutes that have conferred jurisdiction on the County Courts in other torts have excepted Slander and the Action per quod servitium.

The last word of the legislature on the subject was the Slander of Women Act, 1891. This abolished the need of showing special damage in the case of words which impute inchastity or adultery to any girl or woman.

Thus far the attempt has been made to elucidate 'those obscure historical accidents,' as Sir F. Pollock phrases it, which have conduced to the dichotomy which now obtains in our system; and which, alas! is too firmly imbedded there for any reasonable hope of alteration. Since *teste Dauncey* v. *Holloway* the bias against a liberal interpretation of the action for slander survives as unyieldingly as it was in the days of Coke and Hale.

Dauncey v. *Holloway* was tried before Mr. Justice Wright in the year of grace one thousand nine hundred and one, and may therefore be regarded as the last word of the judiciary on the subject.

The plaintiff in the court of first instance was a solicitor in considerable practice. The slanderous words complained of were: 'They tell me that he has gone for thousands, not hundreds this time,' and 'I am told that he has lost thousands.' The statements were quite untrue, and not justified in any way. Mr. Justice Wright held that the words were not actionable unless the solicitor could prove special damage: for the words *per se* are not in law capable of conveying an imputation upon the plaintiff in his

character as a solicitor. This decision was upheld on appeal by a Court composed of the late Master of the Rolls, and Lords Justices Vaughan Williams and Romer.

Considering the repute of the names whose imprimatur the decision bears, it is hardly possible to say that the judgment is not good law. But it is certainly not good sense. For firstly, a solicitor is in the habit of handling large sums of clients' money, and secondly, clients' confidence in the honour of individual solicitors is over-ready to take the alarm since a recent *cause célèbre*. Yet the imputations in *Dauncey* v. *Holloway* were held not to touch the plaintiff in his professional reputation or capacity. It would have been instructive had the Court of Appeal framed a defamation or two which they would deem slanderous of a solicitor in his professional capacity. One would be apt to imagine that at present 'there is no such thing.'

But if it were possible, if it is not now many centuries too late, it might be suggested that there are already in existence two rules of law which would amply cover the smallest slander. The first is the rule in *Rylands* v. *Fletcher*, the duty of absolute insurance. Why should not the slanderer who speaks without or in excess of privilege be answerable for the loss of any fair fame that may reasonably follow? He is not bound to say anything. The second is the rule that obtains in trespass to realty and assaults to the person. The least putting to fear, we are told, without actual battery, is answerable in damages: the least trespass is a wrong, even though the mere bruising of certain blades of grass be all the damage. Which means that no damage at all is necessary to ground the action. And a man is no more bound to tell lies of his neighbour than he is to walk over his neighbour's garden. But the law will probably remain as it is to the end, for as Sir Frèderick Pollock says, 'the law went wrong from the first in making the damage and not the insult the cause of action.'

FRANK CARR.

LAWYERS AND THE PUBLIC[1].

I HAVE not, perhaps, a right to assume that it will be admitted that the legal profession fulfils any useful function whatever in society. The opinion is not infrequently expressed, and sometimes not wholly without seriousness, that the lawyers might with advantage be altogether dispensed with. I remember hearing some seventeen years ago, when I first came to reside in Wellington, that a debate had a short time previously taken place in the Union Debating Society of Wellington on a motion in the following terms:—'That the legal profession is a parasite infesting the community, and ought to be extirpated.' This is, I think, the most pointed form in which I have ever heard such an opinion put forward, and the terms of the motion have never been effaced from my memory. They have constantly recurred to my mind, and have always been a source of very great pleasure to me. The mover of the proposed resolution was a well-known political doctor of this city. I do not use the expression in any offensive sense, but merely to indicate that he was (and he still is) a doctor of medicine (though not in practice) and at the same time a vigorous politician. I have always admired the perfect form and, I believe (from a medical point of view), technical completeness of the motion brought down by the doctor against the lawyers on that occasion. The profession was a *parasite—infesting* the community—and ought to be *extirpated*. The motion was certainly not wholly serious on the part of the doctor, but I understand that the speech by which he supported it exhibited a certain element of genuine feeling, and that he was met with some feeling by certain members of the legal profession who were present. The debate, I understand, became warm. It is probable that a few things were said about the doctors also.

The profession of the law nevertheless continues to exist. It may therefore be presumed to have a function, and I propose to inquire what this function is.

And, first, I will take a lay opinion. The subject is to some extent dealt with by Ruskin in 'Unto this Last.' 'Five great intellectual professions,' he says at p. 31, 'relating to daily necessi-

[1] The substance of this paper was delivered as a public lecture at the Victoria University College, Wellington, New Zealand. It was one of a series of public lectures given by the professors and lecturers at that College to mixed audiences.

ties of life, have hitherto existed—three exist necessarily, in every civilized nation:—The Soldier's profession is to *defend* it. The Pastor's to *teach* it. The Physician's to *keep it in health*. The Lawyer's to *enforce justice* in it. The Merchant's to *provide* for it. And the duty of all these men,' he says, 'is, on due occasion, to *die* for it. "On due occasion," namely:—The Soldier, rather than leave his post in battle. The Physician, rather than leave his post in plague. The Pastor, rather than teach Falsehood. The Lawyer, rather than countenance Injustice.' And then he asks as to 'the Merchant—what is *his* "due occasion" of death?' and the rest of his book is occupied with the case of the merchant. 'It is the main question,' he says, 'for the merchant, as for all of us. For, truly, the man who does not know when to die, does not know how to live.'

I might have contented myself with citing simply Mr. Ruskin's statement that the lawyer's profession is to enforce justice, but I have quoted the passage in full because it contains the further emphatic proposition that it is the duty of the lawyer to die rather than countenance injustice, to which I shall return.

Some may think that Mr. Ruskin was a man of genius, a moralist of deep insight, and a great master of language, but a man who lived too remote from the world of business for his ideas upon such a subject to be of any practical value. Some lawyers in England appear to have thought so at the time when the above passages were first published. 'I hear,' says Mr. Ruskin, in a note at p. 78, 'that several of our lawyers have been greatly amused by the statement in the first of these papers that a lawyer's function was to do justice. I did not intend it for a jest.'

The lawyers who are said to have been amused would not, however, probably have denied that, theoretically at all events, the *raison d'être* of the profession is that it should assist in the administration of justice; though their experience of the practical working of things may have caused them to smile when Mr. Ruskin put the matter so high as to assert that a lawyer must die rather than countenance injustice. The amusement of the lawyers referred to is to be accounted for, in my opinion, partly by the fact that they did not know themselves. The general proposition of Mr. Ruskin, that the function of the profession is the administration of justice, has, I think, always been and is now admitted, or rather asserted, by the profession generally, and by some in terms as strong and high as those of Mr. Ruskin himself.

The first title of the first book of the Digest of Justinian has the heading 'De Justitia et Jure'—'Concerning Justice and the Law.' And the first sentences of the Digest, taken from a work of

Ulpian, may be translated as follows:—'Before we give our attention to the law (*jus*) itself, we ought first to inquire whence it derives its name of "*jus*." It is called so from "justice"; for, as Celsus elegantly defines it, the law (*jus*) is the art of what is right and just, or right and equitable (*boni et aequi*). For which reason we [i.e. the lawyers] may rightly be called priests: for we are given over to the service of Justice (*justitiam namque colimus*), and the knowledge which we profess is that of the right and equitable (*boni et aequi*).'

The above passage from the Digest is referred to in Pollock and Maitland's History of English Law (i. 187[1]). Speaking of Bracton, the learned authors say that, though 'the main matter of his treatise is genuine English law laboriously collected out of the plea rolls of the King's Court,' his debt to the Roman lawyers is inestimably great—that but for them 'we should have missed not only the splendid plan, the orderly arrangement, the keen dilemmas, but also the sacerdotal spirit of the work.' They add in a note, citing Bracton's almost literal repetition of Ulpian's words, 'This old phrase is no cant in Bracton's mouth; he feels that he is a priest of the law, a priest for ever after the order of Ulpian.' And the text would evidently have justified them in substituting 'Justice' for 'the law,' and in saying that Bracton felt himself to be 'a priest of Justice and a minister of her sacred laws.'

But that, it will perhaps be said, is an old-fashioned way of thinking and speaking about things: men neither say nor think such things in these times. An address was delivered in the year 1900 in this city of Wellington by the Chief Justice of the Colony at the opening meeting of the Wellington Law Students' Association. In concluding that address His Honour used these words:—

'His hearers must never forget that their profession was a noble and an honourable one, and that it could only remain noble and honourable when those in its ranks had high ideals and high aims, and always remembered that the object of the profession is the dispensing of justice.'

One often hears a barrister or solicitor spoken of as 'an officer of the Court.' This is not a mere fancy on the part of those who use the phrase. If you look at our Law Practitioners' Act, 1882, you will find that barristers are spoken of as 'barristers of the Court' and solicitors as 'solicitors of the Court,' 'the Court' being interpreted to mean 'the Supreme Court of New Zealand,' and the Court has a summary jurisdiction over them as barristers and solicitors of the Court. They are answerable for their conduct as such to the Court. They are, as a matter of law, officers of the Supreme Court of New Zealand.

[1] P. 208, 2nd ed.

And what is the Supreme Court of New Zealand? As at present constituted it exists under and derives its authority from The Supreme Court Act, 1882, section 4 of which is in the following words:—

'There shall continue to be in and for the Colony of New Zealand a High Court of *Justice*, called as heretofore the Supreme Court, which shall be a Court of record for the administration of *justice* throughout the Colony.'

So that it is clear that in the eye of the law also the function of the profession is the administration of justice, its members being officers of a High Court of Justice, charged with the administration of justice throughout the Colony.

I think, therefore, that we may take it as established both as a matter of opinion, professional as well as lay, and as a matter of law, that the function of the legal profession ought to be and is the administration of justice.

It will probably, however, be objected to this, that the phrase 'the administration of justice' means really nothing more than 'the administration of the law,' and that the law is by no means synonymous with justice; that it is the law with which the Courts and the profession are concerned, and that with justice they have no concern whatever. 'It may be law,' the public sometimes say, 'but it is not justice.' And the lawyers have often to agree with the public.

And it is, of course, quite certain that, with one slight exception to which I will afterwards refer, it is justice according to law only which the Courts have any power of *enforcing*, and in the *enforcement* of which the profession can take any part. Although by section 4 of the Supreme Court Act, 1882, the Supreme Court is constituted a High Court of Justice for the administration of justice throughout the Colony, the jurisdiction which is given to it (by section 16 of the same Act) is all 'jurisdiction which may be necessary to administer *the laws* of the Colony.'

The Supreme Court Act, however, assumes that in administering the laws of the Colony the Court will, as far as practicable, be administering justice. The operation of the law is intended to be the working out of justice. The object of the constitution of the Court, and of the institution of the legal profession, is 'the dispensing of justice.'

What then is this 'justice' which the law admittedly only imperfectly realizes, but which it is intended as far as possible to give effect to?

Of the modern works with which I am acquainted, the two

which give the fullest discussion of the idea of justice are the volume of Mr. Herbert Spencer's Principles of Ethics, published under the title of 'Justice,' and Professor Sidgwick's Methods of Ethics. Mr. Spencer resolves Justice into an equality of freedom. Professor Sidgwick agrees that 'the prominent element in justice as ordinarily conceived is a kind of equality: that is, impartiality in the observance or enforcement of certain general rules allotting good or evil to individuals.' He finds a difficulty, however, in arriving at a conclusion as to what kind of equality it is that is really aimed at by the sense of justice as ordinarily felt, and he appears to doubt whether justice as ordinarily conceived can be *wholly* resolved into any kind of equality. He criticizes, amongst other views, the view that justice may be resolved, simply, into equality of freedom. 'Ideal justice seems,' he says, 'to demand that other things should be divided equally besides freedom, or at least justly (if justice be not identical with equality, but merely exclusive of arbitrary inequality).' This difference, or apparent difference, of opinion between Mr. Spencer and Professor Sidgwick seems due to the fact that the term Justice has at least two distinct senses in common modern usage. The fundamental proposition of Mr. Spencer's book, the ground, really, upon which his law of equal freedom is made to rest, is stated by him (at p. 115) in the following terms: 'Each individual ought,' he says, 'to receive the benefits and the evils of his own nature and consequent conduct: neither being prevented from having whatever good his actions normally bring to him, nor allowed to shoulder off on to other persons whatever ill is brought to him by his actions.' Now there is one sense of the term Justice, as ordinarily understood, to which, I think, that statement completely answers. Justice, in a strict sense of the term, strict Justice, as I will venture to call it, would, I think, be generally considered to have been completely done, if the principle of that statement had in any way been entirely realized. Justice, however, in another sense of the term, what I will venture to call Ideal Justice (using an expression of Professor Sidgwick's, though not in the sense in which he uses it), would not, I think, be generally considered to have been satisfied with even such a result. Ideal Justice aims, I think, at nothing less than an equality of good. It is not content, I assume, that men should be born into the world with such unequal 'natures' leading to such unequal 'consequent conduct' and to such unequal measures of good and evil. It aims, therefore, at an equality of development: not necessarily a uniformity, but, on the whole, an equality, of development: physical, mental, moral, and spiritual: which is itself the main part of an equality

of good, and which, when added to something like an equality of external conditions, would make up a complete equality of good. It will, however, I think, be generally agreed that it would be a true equality of freedom, a true equality of external conditions, a system under which each individual would truly be allowed to receive the benefits and truly be made to suffer the evils of his own actual nature and consequent conduct, that would tend most to the bringing about of an equality of development, that would tend most, therefore, to the establishment of a true equality of good. If this is so, then it is through the enforcement of strict justice alone that ideal justice can be ultimately established.

It is with the enforcement of strict justice that the law, therefore, immediately concerns itself, the realization of ideal justice being, however, its ultimate aim.

If any one could devise a system of distribution, in regard to which he could establish to the satisfaction of all that it would in practice carry into effect the principle embodied in Mr. Spencer's proposition, he would be hailed on all hands as having indeed discovered the principles of the perfect State, the State in which justice would indeed be realized. No one has, however, as yet succeeded in doing so.

Take, for instance, the ideas of Mr. Spencer himself upon the subject. From the proposition already stated he deduces first his law of equal freedom. So far all will probably follow him. If he can establish and maintain a true equality of freedom, he will have done, certainly, all that is required. But how does he propose to do so? By enforcing simply the following universal rights (I give them by the names by which he calls them): the right, namely, to physical integrity, the rights to free motion and locomotion, the rights to the uses of natural media, the right of property, the right of incorporeal property (patent rights and copyright), the rights of gift and bequest, the rights of free exchange and free contract, the right of free industry, the rights of free belief and worship, and the rights of free speech and publication. This state of things has, of course, never even approximately been realized, even when the doctrines of free contract and free industry were in their fullest vogue, for amongst the rights to the uses of the natural media, which should belong equally to every individual, Mr. Spencer includes the right to the use of the land. His principles could not, therefore, be even approximately applied without, as a first condition, a complete solution of the land question. But, further, even if it be assumed that the land question has been first solved in accordance with his own principles, by securing to each individual, that is to say, an equal right to the use of it, or an equal share in

its total unimproved value, it seems to be the opinion of other competent authorities, who have probably given more special attention to this particular point than Mr. Spencer, that the mere enforcement of contract could not establish, or at the least could not maintain, a distribution of the joint products of the industry of the community in anything like proportion to the services contributed. If so, then the fundamental principle of strict Justice would be by no means realized. This appears to be the opinion of Professor Sidgwick. He discusses the reasons which, to use his own language, 'have led some political thinkers to hold that Justice requires an entirely different mode of distributing payment for services from that at present effected by free competition, and that all labourers ought to be paid according to the intrinsic value of their labour as estimated by enlightened and competent judges.' 'And certainly,' he goes on to say, 'this appears a nearer approximation to what we conceive as Divine Justice than the present state of society affords.' He finds, however, grave difficulties about this method also. I do not say, therefore, that it has his full authority. It is a method certainly very different from that advocated by Mr. Spencer, but contended for by some thinkers perhaps equally competent to pronounce upon the subject.

It would seem, then, since moralists are not agreed, that the lawyer, as such, is justified in assuming that to be just which the law treats as being so.

When he finds, therefore, that in the Common Law men are generally bound by their contracts freely and deliberately entered into, he must assume (so far as that rule is accepted in his jurisdiction) that on the whole justice will be done by the enforcement of such contracts. When, on the other hand, he finds that in New Zealand, in respect of a large proportion of business transactions, the law is that men shall not be individually free to contract, but that their service shall be paid for (to use the expression of Professor Sidgwick) 'according to its intrinsic value . . . as estimated by enlightened and competent judges,' namely, by an Arbitration Court, he must assume that, in that department of business at all events, justice will be done by the enforcement of the rates of pay which have been fixed by that Arbitration Court.

'What then?' it may be said. 'It is with the law only, after all, that the lawyer is in any way concerned. His function may be the administration of justice, but it is justice according to law only, after all, with which he need in any way concern himself.' In a sense—yes, but in another sense—no. He must accept the view of the law in all cases as to which it has been deliberately and unmistakably expressed, in all cases which the law has clearly

had in contemplation and the mode of dealing with which it has unmistakably prescribed. But cases must inevitably arise which the law has not had in contemplation, for which it has made no adequate provision, and in regard to which the application of the rules which it has in fact prescribed will work injustice. 'Lex,' said Lord Bacon, 'non sufficit casibus; sed ad ea quae plerumque accidunt aptatur: sapientissima autem res tempus (ut ab antiquis dictum est), et novorum casuum quotidie auctor et inventor.' (De Augmentis Scientiarum, Aph. 32.) 'The law cannot meet all cases; it is framed to suit those things which for the most part happen; but Time (as has been said by the ancients) is the most fertile of things, every day the author and inventor of new circumstances.' It is in the nature of anything which can be called a *system* of law that cases should sometimes arise which it will fail to meet, that cases should perhaps often arise which it cannot wholly meet. Vast and complex as any system of law may be, the concrete world of fact, to which it has to be applied, is vaster and more complex still. The very fact that it is a *system* framed and cognizable by man implies that, so far as it has been really framed at all, it is of a *definite*, in other words of a *finite*, nature. The world of fact, on the other hand, is *infinite*. It has often been suggested that, in view of this necessary defect in any definite system of law, Courts of Justice ought not to be bound by anything in the way of hard and fast rules, that the commission of every judge should be to deal with every case in such manner as he shall find 'to stand with equity and good conscience.' Such a power is, as is well known, given to a limited extent to magistrates in this country (in cases, that is to say, in which the amount involved does not exceed £20), the same power having long been in the hands of Courts for the recovery of small debts in England. The judges of the superior courts both in England and in the Colonies have also what is called 'a discretion' in regard to many matters. The recent tendency has been to extend the principle of judicial discretion, at all events in matters of procedure. It is possible that the principle may receive further application in the future. But there is a danger, or there has been always felt to be a danger, attending it. 'The discretion of a Judge,' said Lord Camden, 'is the law of tyrants; it is always *unknown*; it is different in different men; it is casual, and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst it is every crime, folly, and passion to which human nature is liable.' The same idea is expressed, in a somewhat less severe form, in the celebrated passage in Selden's Table Talk, comparing the law with equity as it was in his day:—

'Equity is a roguish thing. For law we have a measure—know what to trust to. Equity is according to the conscience of him that is Chancellor; and as that is larger or narrower, so is Equity. It is all one as if they should make the standard for the measure that we call a foot, a Chancellor's foot. What an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing in the Chancellor's conscience.'

There is a passage in Pollock and Maitland's History of English Law (vol. ii. p. 561 [1]), which has some reference to this matter. After discussing the old 'forms of action,' as they were called, and the great variety, complexity, and rigidity of the rules of procedure specially applicable to each in medieval times,

'Let us not,' the learned authors say, 'be impatient with our forefathers. "Discretion" is not of necessity "the law of tyrants" [referring of course to Lord Camden's dictum upon the subject], and yet we may say with the great Romanist of our own day that formalism is the twin-born sister of liberty. As time goes on there is always a larger room for discretion in the law of procedure; but discretionary powers can only be safely entrusted to judges whose impartiality is above suspicion and whose every act is exposed to public and professional criticism. One of the best qualities of our medieval law was that in theory it left little or nothing, at all events within the sphere of procedure, to the discretion of the justices. They themselves desired that this should be so and took care that it was or seemed to be so. They would be responsible for nothing beyond an application of iron rules.'

The last two sentences of this passage point to another aspect of the matter. The possession of an overriding power of deciding in any case according to what they should consider to be 'equity and good conscience' would throw a very great responsibility upon the judges, which most, it is certain, would be very loth to assume. In small matters, within the limits within which such a power is in the hands of a magistrate in this Colony, the corresponding responsibility is of course comparatively small, though the case is sometimes important enough to the parties concerned. But even in such cases the power, although fully possessed, has been very sparingly exercised. The number of cases which have been decided by magistrates or justices expressly upon grounds of 'equity and good conscience' is exceedingly small when compared with the vast number which have been disposed of according to law or according to the view of the law taken by the magistrate or by the justices. It is probable that this is partly due to a disinclination to assume the responsibility of exercising such a power. It is, however, mainly due to this, that in the vast majority of cases

[1] P. 563, 2nd ed.

the law does do substantial justice, that in the vast majority of cases a plain man, having all the circumstances before him, cannot, at all events, see his way to do any better justice than by applying the law to the best of his ability. It may be argued from this that no great harm could come of extending the power; that it might be given to all the Courts and without any limit as to the amount involved; that, still, the vast majority of cases would be decided according to law, but that in exceptional cases, where the law itself could not do justice, the power would be exercised, and that failures of justice (or those, at all events, arising merely from defect of the law) would thus be prevented. I can only say that the opinions which I have just cited, and the history of attempts, in the direction suggested, in other countries, seem to point to a necessity for the very greatest caution in such a matter. The public often complain of the uncertainty of the law, as it is.

However that may be, it is the law, simply, in the *enforcement* of which the lawyer can, at the present time, take any part. In the vast majority of cases a true application of the law to a true view of the facts of the case will do substantial justice. Though it is the rules of law which are in terms applicable which alone can be *enforced*, it is justice at which the law aims, it is justice which it is the function of the lawyer to *bring about*, if in any way he can.

I return, therefore, to the statement that the function of the lawyer, the service which he is as far as possible to render to the public, is the bringing about of justice.

Some perhaps will be inclined to say that in theory the lawyer renders service to the public as an officer of a High Court of Justice, an official, as it were, of the great Public Department of Justice, but that, in practice, he is a mere agent of his client, in consideration of a fee received or to be received from his client, whose interest alone he is concerned to consider, and does in any way consider, unless indeed it be his own personal interest only. Now it is perfectly true that the lawyer is, in practice, the agent of his client. This, however, in no way conflicts with the statement that his function is the bringing about of justice, for, if he is in any way what he ought to be, then it is in the interests of justice that the client should have him for an agent. And it is true that it is the interest of his client which it must always be his most immediate concern to secure and protect. This also, however, is in general in the interests of justice. But it is *not* true that it is the interest of his client *alone* which he is in any way concerned to consider. At no stage of any transaction, in no department of his professional activity, can his true duty to his client be in conflict with his paramount function, from which indeed his duty

to his client is derived and upon which it depends, the function namely of contributing, so far as in him lies, to the bringing about of justice. He becomes the agent of his client, he concerns himself most immediately with the interest of his client, because it is, in general, in the interests of justice that he should do so; but he will endeavour always, so far as in him lies, to bring about in every transaction that which is just and reasonable in the interests of all concerned, and in no department of his activity will he ever lose sight of everything but the interest of his client; in every department there are limits set, in the interest of public justice, to what he *may* do in the interest of his client, limits which, if he has any true sense of the position which he occupies, he will consider it imperative that he should observe.

The idea that, whatever the theory of the matter may be, the practice of the profession of the law, and more especially of the profession of an advocate, is necessarily incompatible with habitual conformity to the highest ethical standard, is a very prevalent one, and is not confined to the ignorant. In a work published during the year 1899 by Mr. Lecky—The Map of Life—the subject of the ethics of advocacy is to some extent dealt with. The portion of the work relating to the matter is headed 'Moral Compromise in the Law'—an ugly-sounding phrase. I desire to quote the following passage from pp. 101 and 102:—

'In the interests of the proper administration of justice it is of the utmost importance that every cause, however defective, and every criminal, however bad, should be fully defended, and it is therefore indispensable that there should be a class of men entrusted with this duty. It is the business of the judge and of the jury to decide on the merits of the case, but in order that they should discharge this function it is necessary that the arguments on both sides should be laid before them in the strongest form. The clear interest of society requires this, and a standard of professional honour and etiquette is formed for the purpose of regulating the action of the advocate. Misstatements of fact or of law; misquotations of documents; strong expressions of personal opinion, and some other devices by which verdicts may be won are condemned; there are cases which an honourable lawyer will not adopt, and there are rare cases in which in the course of a trial he will find it his duty to throw up his brief. But necessary and honourable as the profession may be, there are sides of it which are far from being in accordance with an austere code of ideal morals. It is idle to suppose that a master of the art of advocacy will merely confine himself to a calm dispassionate statement of the facts and arguments of his side. He will inevitably use all his powers of rhetoric and persuasion to make the cause for which he holds a brief appear true, though he knows it to be false; he will affect a warmth which he does not feel, and a conviction which he does not hold; he will

skilfully avail himself of any mistake or omission of his opponent; of any technical rule that can exclude damaging evidence[1]; of all the resources that legal subtlety and severe cross-examination[2] can furnish to confuse dangerous issues, to obscure or minimise inconvenient facts, to discredit hostile witnesses. He will appeal to every prejudice that can help his cause; he will for the time so completely identify himself with it that he will make its success his supreme and all-absorbing object, and he will hardly fail to feel some thrill of triumph if, by the force of ingenious and eloquent pleading, he has saved the guilty from his punishment, or snatched a verdict in defiance of evidence. It is not surprising that a profession which inevitably leads to such things should have excited scruples among many good men[3].'

This description is unfair in two respects: first, because it confuses the conduct of a civil cause with the defence of a prisoner on trial for his liberty or life, in regard to which the degrees of latitude allowed as right are very different; and secondly, because it makes no distinction between the conduct of one civil cause and another, according to the merits or the particular circumstances of each case. The greatest masters of the art of advocacy, in my experience, are not men who will use all their powers in every cause. They are men, rather, who have a sense of what is fitting upon each occasion, and who act accordingly.

I have cited this passage, however, chiefly to bring out a single point. It is in the interests of the proper administration of justice, says Mr. Lecky, it is indispensable, that there should be a class of professional advocates; but, necessary and honourable as the profession may be, there are sides of it which are far from being in accordance with an austere code of ideal morals; the practice of it leads inevitably to things which are inconsistent with such a code. And in another place (at pp. 111, 112) he says that 'at best there must be many things in [the profession] from which a very sensitive conscience would recoil.' This is, in my opinion, a false and a pernicious doctrine.

It is false, because upon no rational theory of morals can it be theoretically true, and because, further, it is not in accordance with the facts of the practice of the profession as actually carried on. It is pernicious, because nothing is more calculated to bring about that very state of things which it falsely represents as existing.

[1] If the rule appealed to is law, it is not only the right but the duty of the lawyer to call attention to it. All rules are called 'technical' by those against whom they operate.—Ed.

[2] How else are you to find out whether a hostile witness is lying or not?—Ed.

[3] Exactly the same may be said of the minister of religion committed to preach particular doctrines, and of the politician committed to the platform of his party. Mr. Lecky's strictures appear to me quite unworthy of his abilities: not to say that the matter was dealt with once for all by Dr. Johnson in a passage too familiar for citation. See L. Q. R. xv. 263.—Ed.

'The clear interest of society requires' something 'from which a very sensitive conscience' must nevertheless 'recoil.' It is a position which it is, I think, surprising to find taken up at the present day by a person of Mr. Lecky's standing.

The language employed by Mr. Lecky is, I think, worthy of a little further consideration. 'Necessary and honourable,' he says, 'as the profession may be, there are sides of it which are far from being in accordance with an austere code of ideal morals,' 'at best there must be many things in [it] from which a very sensitive conscience would recoil.' The two expressions are apparently used as synonymous. That which 'a very sensitive conscience' must require is that which is 'in accordance with an austere code of ideal morals.' Now the comment which I would wish to make upon this is the following. It is clear, in the first place, that no *code*, whether of *ideal* or of any other kind of morals, can entirely answer to the requirements of the conscience. Just as, for the reasons already mentioned, no *system* of law can, from its very nature, be wholly adequate to the doing of complete justice, so no *code* of morals can, from its very nature, be wholly adequate to the determination under all circumstances of that which is right. A code of morals is, however, a useful, and in fact indispensable, aid to the right direction of conduct in practical life, just as a system of law is a useful, and in fact indispensable, aid to the practical administration of justice. But the measure of the value of a code of morals, just as the measure of the value of a system of law, lies in the degree to which it is adapted, though it cannot be wholly adapted, to the requirements of every department of life as it is, in the extent to which it makes provision, though it cannot make full provision, for every phase of the actual. The code, however, in entire conformity with which the profession of an advocate cannot, in Mr. Lecky's opinion, be carried on, is described by him as 'an austere code of *ideal* morals.' This expression in itself indicates what is in my opinion otherwise abundantly clear. The code of morals which Mr. Lecky has in view is one, not framed as far as possible to meet every phase of the actual, but applicable only in some ideal, in the sense of non-existing, condition of things. Moreover it is an *austere* code. *Austere*—severe, harsh, rigid, stern, are the meanings given in Webster. 'Rigid' is evidently the sense applicable in the present instance. A rigid code, not framed to meet, as far as possible, the requirements of the actual, conceived indeed as authoritative without reference to its adaptation to the actual, and in fact grossly inadequate to meet its requirements, such is the code which Mr. Lecky has in view when he uses the language which I have quoted. In exact accordance with such a code, it may

be at once admitted, the profession of an advocate cannot by any possibility be carried on. It does not seem to have struck Mr. Lecky that further approximation to the moral ideal cannot come of a fixed set of rules, but only of the moral instinct of right-minded and rightly informed men called on to act in new circumstances of difficulty. It is the code which is defective, not the conduct which is wrong. That, I think, is the philosophical answer to the position taken up by Mr. Lecky.

Mr. Lecky may, however, be more shortly, and perhaps more forcibly, answered in a way which will recommend itself more immediately to common sense. If the profession of an advocate is a necessary one, as it admittedly is, then it is right that men should practise it; and, if it is right that men should practise it, nothing is more certain than that there must be a right way or ways in which it can and ought to be practised. And so also in regard to every other branch of the profession—or indeed to any other profession or calling. Fulfilling as it does a necessary function, the question can never be whether there is any way in which it can be rightly carried on, the question always can only be what is that right way, which certainly exists, and in which it ought to be carried on. Neither will it serve to say that in practice there must inevitably be a deflection from that which is right. In one sense it is true, but it is equally true of all human activity to say that human nature and faculties are not infallible. It may be difficult often to know what it is that is right—difficult often in the press of business requiring an immediate decision. Errors of judgment must certainly be at times committed. But to say of any necessary or useful profession or occupation, of any form, that is to say, of human activity, I do not care how high, I do not care how humble, the end of which is good, that the following of it must inevitably either pervert the moral sense, or lead to the doing of one single act or the speaking of one single word contrary to the bidding of the moral sense, is in my opinion to preach a false and a pernicious doctrine.

There is a right way of practising the law. The question only can be—what is that right way? The general answer evidently is, that it is that way which is most calculated to promote the ends of justice. It is the particular application of this general principle to the various situations in which a lawyer is in practice called upon to act, with which is concerned that branch of the Science of Applied Ethics known as the Ethics of the Legal Profession.

Were any one to set himself to work to write anything in the nature of a scientific treatise upon the Ethics of the Legal Profession, his main business would consist in the collection, ascertainment,

and arrangement of the established rules and well-recognized methods, according to which it has been and is being carried on by those who have in the past practised it and are in the present practising it according to its best traditions. He might be able to formulate and define, perhaps, in some directions, in which there may at the present be a general sense only of what it is that is fitting. He might be able to make suggestions here and there, which would, of course, be open to criticism and discussion. But in the main his business would consist in the ascertainment and recording of well-established rules and traditions. Those rules and traditions represent, in fact, the accumulated experience of the profession as to what are the methods of practising it, in all its branches, which are, in fact, most calculated to promote the end for which the profession is established, the dispensing of justice.

Let no one therefore suppose that the proposition which I have been maintaining in this paper has about it, if properly understood, anything which can be considered to be in the least degree Quixotic or visionary. The most fruitful source of misunderstanding in connexion with the whole subject lies, I think, in the fact (for I think it is a fact) that people are apt very often to forget that it is not his own business which the lawyer has to transact, but the business of his client. This is a very obvious fact, no doubt, but people are apt to forget it. It is the client's interest which is always at stake, the client's rights which are always involved. If in any case the law, owing to its necessary imperfection, gives the client rights which are more than in justice he is entitled to, the full enforcement of which must therefore work injustice, it is in the justness of the client only that the proper remedy can lie. The lawyer cannot, nor has he any right to, make his own conscience the conscience of his client. It is with the client that the decision must rest, and it is the instructions of the client which the lawyer has, in the last resort, to carry out, if he is to act at all. It is always open to him, if he chooses, to refuse to make himself the instrument of what he thinks injustice. Nothing, however, is more certain than that the laying down of such a rule, of a rule, that is to say, that he is in all cases to make his own opinion of what is just the test of whether he will act or not, so far from tending to promote the ends of justice, would have an entirely contrary effect. It is in the interests of justice that the profession should as far as possible consist of just men. It is in the interests of justice also that the business to be transacted should as far as possible be transacted by just members of the profession. The just member of the profession is, therefore, not in general to drive away his client. He is not to seek in general to impose upon his client his own

views of right and wrong, whatever he may do in the way of diplomatic counsel or suggestion. He is not in general to obtrude himself upon his client, when he clearly sees that no good can result from his so doing. He is in general to keep his client, if he can, and in the doing of the business of his client, he is in all ways which are reasonable and practicable to do what it may be really open to him to do in the direction of justice. I do not say that he must always keep his client. There are many things, certainly, which the lawyer may not do for any client. What these things are, up to what point the lawyer is to go, beyond what point he may not go, it is the business of the ethics of the profession to define, and it is with these things that the rules and traditions of the profession have in fact concerned themselves. The practice of the profession, in those ways, in all respects, and at all times, which are most calculated to promote the ends of justice, so far from being an impossible ideal, is in fact no more than the maintenance of what has, broadly speaking, been already realized. It is the practice of the profession in accordance with the established rules, the recognized traditions, of the profession as it exists to-day. These rules may in the future be improved, those traditions may no doubt be added to: there is nothing human that is perfect; they represent, however, it is certain, the best answer which has yet been given to the question in what way the profession in which they have been developed may best promote the end for which it has in fact existed.

If what I have been saying is true (and there can, I think, be no real question that it is), then it is a matter, certainly, of very great importance that these rules and traditions of the profession to which I have been referring should be collected and recorded, that they should, if possible, be further formulated. They ought, in my opinion, to be taught in every Law School—not left to be gathered merely in the course of practice.

But just as in the past no rules as to specific matters, no particular traditions, could have wholly served the purpose for which they were intended without the aid of that general tradition (which has in fact existed and in which all other rules and all other traditions have in fact had their origin)—the general tradition, namely, that the function of the profession is the promotion of justice, so, in the future, no code which could be drawn up, however complete, could wholly serve its purpose, unless it began and ended with that great rule from which all others must in fact have been derived, the rule, namely, that it is the duty of the lawyer under all circumstances, and at all times, in all ways in which he practically can, to so act that justice may, as far as possible, result.

If the lawyer does that, if he obeys in all things the rules of his profession, those rules which experience has approved as best calculated to promote the ends of justice, if he does all that he reasonably and practically can to bring about the ends of justice, then, although he may be concerned with much injustice, he 'countenances' none. If he does less, however, he must in truth be said to 'countenance injustice.' It is in this sense, I think, that Mr. Ruskin's proposition must be understood. Understood in this sense, it is true, certainly, that the lawyer must die 'rather than countenance injustice.' And I have no hesitation in saying that of most lawyers it can in truth be said that they are prepared to die, and do die, daily, 'rather than countenance injustice.'

One point more in conclusion. At the outset of this paper I referred to an opinion which is sometimes expressed, and sometimes, I believe, really entertained, that the lawyers might, with advantage, be altogether dispensed with. There is a modified form of this view which I wish now, in conclusion, to speak of. It is sometimes thought that though the lawyers are undoubtedly necessary, they are necessary only because of the wickedness of the public, that, as the law was, so have the lawyers also been added because of transgressions—the word 'transgression' being used in the sense of 'wilful transgression,' in whatever sense it may have been used in the original. Even in this modified form, however, the opinion can, I think, be demonstrated to be erroneous. Dr. Holland, in his Elements of Jurisprudence, gives a number of definitions of 'Law as a Rule of Action' selected from the works of the greatest writers upon the subject. Amongst these is a definition by the great German jurist, Savigny. It is practically identical with that previously given by Kant (and also quoted by Dr. Holland), and with that also which was afterwards independently arrived at by Mr. Herbert Spencer. A free, but I think a correct, translation of this, using however in one respect the language rather of Kant than of Savigny, would be as follows:—'The Law is the sum-total of the Rules by which are determined the limits of the sphere within which each individual can freely and securely live and move'—without, that is to say, invading the like sphere of, or impinging upon, any other individual. Now the limits of the sphere of each require to be determined, not solely, nor perhaps principally, because of any tendency of most to wilfully transgress them, but, largely at all events, because, unless they were determined, and beforehand known, men could not freely and securely move at all. With the best of wills collisions must occur. Men must not only will to keep the law, but they must also know the law they will to keep. They must

not only will to do justice, but they must also know how to do it. It is not the wickedness of the public only, but its ignorance also, which is the *raison d'être* of the lawyer. The profession of the law will therefore continue until unto perfect goodness there shall have been added also perfect knowledge, until, that is to say, the end of all things shall have been accomplished. Not until then will ideal justice have been completely realized. Not until then will the service which the lawyer owes to the public have been fully rendered.

MAURICE W. RICHMOND.

THE SOURCES OF INTERNATIONAL LAW[1].

I.

THE Law of Nations, or International Law, is a body of rules recognized as binding on civilized independent States in their dealings with one another and with one another's subjects[2]. Treaties and conventions between particular States may define any portion of those rules, or add to or vary the existing rules, but any conventional rule so laid down is binding only on the parties to it. Acts of this kind may go to show, according to the nature of the case and the particular circumstances, the existence of general usage which the parties wished to record for convenience in apt words and an authentic form (though this is not common), or the dissatisfaction of the parties with existing usage and their desire to improve on it, or the absence of any settled usage at all antecedent to the particular agreement. It is therefore impracticable, with one exception to be mentioned, to make any general statement as to the value of treaties and similar instruments as evidence of the law of nations. The exceptional case, which is of increasing frequency and importance, is where an agreement or declaration is made not by two or three States as a matter of private business between themselves, but by a considerable proportion, in number and power, of civilized States at large, for the regulation of matters of general and permanent interest. Such acts have of late been the result of congresses or conferences held for that purpose, and they have been so framed as to admit of and invite the subsequent adhesion of Powers not originally parties to the proceedings. There is no doubt that, when all or most of the Great Powers have deliberately agreed to certain rules of general application, the rules approved by them have very great weight in practice even among States which have never expressly consented to them. It is hardly too much to say that declarations of this kind may be expected, in the absence of prompt and effective dissent by some Power of the first rank, to become part of the

[1] Preliminary notes for a chapter intended to form part of the Cambridge Modern History planned by the late Lord Acton.

[2] 'The sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another': Lord Russell of Killowen, addressing the American Bar Association in 1896, L. Q. R. xii. 313.

universally received law of nations within a moderate time. As among men, so among nations, the opinions and usage of the leading members in a community tend to form an authoritative example for the whole. A striking proof of this tendency was given in the war of 1898 between Spain and the United States. Neither belligerent was a party to the article of the Declaration of Paris of 1856 against privateering; the United States had in fact refused to join in it. Moreover the Declaration of Paris was not, in point of form, an instrument of the highest authority. Nevertheless, when the war of 1898 broke out, the United States proclaimed its intention of adhering to the Declaration of Paris, and the rules thereby laid down were in fact observed by both belligerents. It is quite possible that some of the recommendations recorded at the Peace Conference at the Hague in 1899 may sooner or later, in like manner, be adopted as part of the public law of civilized nations by general recognition without any formal ratification.

On the whole then the law of nations rests on a general consent which, though it may be supplemented, influenced, and to some extent defined, by express convention, can never be completely formulated under existing conditions. This is as much as to say that the law of nations must be classed with customary law. Sometimes it is supposed that, so far as it is not included in authentic acts of State, it is at the mercy of opinions expressed by private writers; and this among other topics is made use of to argue or suggest that the very existence of any law in international matters is fictitious. The answer given by the highest legal authorities of the English-speaking world is that the opinions of experienced and approved publicists are valuable not as mere opinion but as evidence: 'Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.' These are the words of Mr. Justice Gray, delivering the majority opinion of the Supreme Court of the United States in a recent case[1]. A century earlier Lord Stowell had relied on Vattel 'not as a lawyer merely delivering an opinion, but as a witness asserting the fact—the fact that such is the existing practice of modern Europe[2].' Where publicists give us, or we have otherwise at hand, the means of testing their conclusions, we are as free to use those means as in any ordinary historical inquiry. This does not, however, make their testimony worthless, as one or two modern writers and judges appear to have supposed.

[1] *The Paquete Habana*, 1899, 175 U.S. 677.
[2] *The Maria*, 1 Rob. Adm. at p. 363.

According to one school of opinion, the rules of international law bind the conscience of nations because they are rules of universal reason, and the consent of nations, express or tacit, is only evidence that the rules actually in force are allowed as reasonable, and therefore probably are so. Or, to use the appropriate technical terms, the law of nations, in the view of this school, is nothing else than a branch of the law of nature. There is much historical truth in this, as we shall presently see. Modern international law came and was received in the name of the law of nature to which both spiritual and temporal rulers had long professed allegiance. But for any other purpose the speculative question seems hardly worth pursuing. All jurisprudence which deals with actual claims of right in the world of actual human contentions has to accept as reasonable that which is generally deemed so by reasonable persons dealing with the matter in hand. Now it cannot be supposed that the whole body of civilized States should consent to what they did not think reasonable, or that the rulers of such States fall far short of the moral and intellectual standard of an average prudent citizen. On the other hand, it is an universal principle of jurisprudence that in cases otherwise doubtful the rule or interpretation which gives the most reasonable result is to be applied; and the law of nations is as much entitled to the benefit of that principle as any other kind of law. The more we admit the analogy of international to municipal law, the less we shall expect it either to cover the whole field of moral duties, or to be reducible to a collection of ethical precepts demonstrated in a regular sequence from first principles. No Congress or Concert of the Powers—not to speak of Lord Stowell sitting in the Court of Admiralty—has ever claimed to be supreme in matters of faith and morals.

The imperfect state of the law of nations, in respect that it lacks a cosmopolitan judicial court with power to execute its decrees, is a well-worn topic. It has been discussed ever since Dante wrote his treatise *De Monarchia*. Some writers have used it as an argument, or have even supposed it to prove conclusively, that there is no such thing as a law of nations. With regard to this contention it seems fit to be considered that in the early history of all jurisdictions the executive power at the disposal of the courts has been rudimentary, if indeed they had such power at all. It is not universally true that even the highest courts in the most civilized modern States can always enforce their judgments. Thirty years before the American Civil War the State of Georgia defied the Supreme Court of the United States for eighteen months, with the open connivance of the President of the United States: 'John Marshall has made the decision, now let him execute it.' But the

decision made by John Marshall stands as part of the law of the United States, and would do so even if its execution had been wholly frustrated in the particular case. In the Middle Ages there was nothing uncommon in rival courts within the same political allegiance obstructing one another's process and thwarting one another's jurisdiction in every way short of violence. More than this, courts have existed with an elaborate constitution and procedure and no compulsory powers whatever. This is the state of things which we read of as prevailing in Iceland not much before the Norman Conquest. No doubt there are fabulous details even in those sagas, that of Njál, for example, which contain most historical matter; but their general account of society and institutions may be taken as truthful enough for our purpose.

It is quite true that, so far as the law of nations has been regularly administered by any courts, they have been the courts of particular States, often though not always deciding questions in which those States were interested. But such courts have always professed to administer a cosmopolitan and not a merely municipal law. They have honestly endeavoured to find impartial guidance. At worst they may be in a position analogous to that of a judge in his own cause. It is best that a man should not be judge in his own cause; but, if we appeal to the analogy of municipal law and to the generally recognized maxims of justice, we shall find that, in case of need, a judge in his own cause is better than a total default of justice and judgment, and that the magistrate who finds himself in that position must hear and determine the cause, forgetting his own interest in it so far as he can.

It is rather commonly assumed that all disputes between sovereign States are analogous to those which cause litigation between individuals, and therefore equally capable of being settled by some judicial process if only an adequate judicial authority were provided. Unfortunately this is not the case. One class of international controversies, those which relate to boundaries and territorial rights, may be said to present an almost perfect analogy to questions between private owners. The main problem, in cases of this kind, is to find an arbitrator, or devise an arbitral tribunal, whose decision will command the respect of both parties. The definition of the question or questions to be submitted may or may not be troublesome. It can hardly be arrived at without some sort of preliminary agreement as to the extent of the matters which are reasonably open to discussion. But these difficulties are of the kind which, with good will and good faith, can be overcome. In fact many questions of boundaries and the like, which in former ages would either have occasioned wars or furnished a convenient

pretext for them, have in our own time been peaceably and honourably settled. Moreover it may be said of these cases, and well supported by the analogy of similar ones in men's private affairs, that a decision given by competent persons after argument is more likely to be just in itself and, what is more, satisfactory to the parties, than a compromise arrived at by direct negotiation.

Other controversies turn on alleged breach or non-performance of active obligations arising out of the interpretation of treaties or official declarations, or out of the common customary duty of nations in particular circumstances, as where a breach of neutrality or excess in the exercise of a belligerent's rights against neutrals is complained of. Such cases are less apt for quasi-judicial treatment than the class first mentioned. It is harder to fix the common ground of admitted fact and to exclude hostile imputations and other inflammatory topics. Few questions are more delicate or indefinite than what can properly be held to amount to 'unfriendly conduct' in a given case. The difficulties are increased if, as often happens, no permanent settlement is possible without laying down regulations for future action which will amount in effect if not in form to a new convention. In cases of this class it may well be the better way to arrange the whole matter by direct negotiation. Even where the settlement has taken the form of arbitration, it may be found that, in determining the questions to be referred to the arbitrator, some or most of the substantial points in issue have really been conceded by one or the other party. This was so, to mention a leading example, in the 'Alabama' dispute between Great Britain and the United States.

But the most dangerous grounds of difference between States are those which do not admit of reduction to definite issues at all, or which can be reduced only to the ancient formula of Lucretius, *uter esset induperator*. Contests for supremacy or predominant influence are not a manageable subject of argument and decision. The formal pretexts for them may be weak, but this does not make the Powers involved more willing to invite or tolerate interference. The only perfectly effectual remedy is a coalition of Powers of superior collective strength, determined that the peace shall not be broken. This, or the fear of it, has prevented a certain number of petty wars; but it can seldom be applicable to a war between States which are powerful enough to resent such interference, or divert it by new combinations. Friendly persuasion, tenders of good offices, and the other beneficent arts of diplomacy, may avert war between Great Powers, have certainly averted it sometimes, and possibly may have done so on occasions and in circumstances which a wise regard for the general interest of peace has hitherto kept secret.

Whatever devices in the way of standing recommendations, committees of inquiry or conciliation, and the like, may serve to smooth the way for any such process, are highly to be commended. But, in the main, the responsibility for dealing with what are called questions of national honour and vital interests must rest, for a long time to come, with the Governments of the Great Powers themselves. Both the material and the moral considerations which make for prudence appear to have gained strength in the last generation. The material ones are obvious and notorious; the moral ones are as yet hardly capable of being expressed in any definite form, but are nevertheless operative. Meanwhile arbitration treaties, carefully framed so as to include only those cases where arbitration is really practicable, are to be desired and praised both for their direct and for their indirect utility, though they must not be supposed to be a panacea.

II.

The origin of the modern law of nations, as a distinct system of rules, is now to be shortly traced. There was a considerable resemblance, now almost forgotten, between the law of nations and another cosmopolitan body of secular custom, the law merchant, in the manner of their promulgation and acceptance. The law merchant has been so thoroughly assimilated by the national laws of all civilized countries that, as regards its separate existence, it may be said to have perished by the completeness of its own victory. But, like the law of nations, it was originally independent of municipal systems, and claimed the respect and aid of local magistrates as a branch of the law of nature, considered as a body of rules demonstrable by natural human reason, and therefore entitled to universal obedience. It was the law of nature that was appealed to for the dialectic solution of national and dynastic controversies; it was in the name of the law of nature that, in England, Edward IV's Chancellor asserted the right of foreign merchants to have their causes tried without the 'solemnities of the law of the land[1].' It is necessary to remember how potent this doctrine was among the publicists of the Middle Ages. The task of Grotius and his precursors and followers was to define and specialize a branch of the law of nature to which all men professed

[1] A. D. 1473, Y. B. 13 Ed. IV, 9, pl. 5. The law of nature had been incidentally recognized as 'the ground of all law' not many years before, 8 Ed. IV, 12. It is not for us here to conjecture whether any scheme of policy in aid of royal power is indicated by these occasional dicta. We know that the Tudors afterwards found statute law their handiest instrument, and that the Stuarts fell back on what they could make, or thought they could, of the Crown's prerogative at Common Law. The 'divine right' theory in its English form is a clumsy and belated piece of speculative natural law, and a bad specimen of its kind.

to bow, not to invent that which was ready to their hands. We should go far astray if we supposed that Gentili or Grotius revived the Roman lawyers' conceptions of *ius naturale* and *ius gentium* for a world which had forgotten them. In fact all political and moral discussion had long been dominated by an elaborate theory of the Law of Nature which may be traced to three distinct sources in the literature regarded as authoritative by the founders of medieval learning. It was constructed, and quite openly constructed, in part on the Aristotelian texts which speak of natural justice, in part on the expositions of later Greek philosophical views, mostly Stoic, found in Cicero and other writers down to the Fathers of the Church, and in part on the technical development of those same views by Roman jurists in search of a theoretical basis for a law which from being national or tribal had become cosmopolitan.

All these fountains of authority were, for scholars of the twelfth and thirteenth centuries, little short of sacred. The Corpus Juris appeared to them not as the historical record of republican and imperial jurisprudence in a heathen empire, but as the deliverance of the orthodox emperor Justinian. The morality of Cicero had been stamped with all but unqualified approval in the repeated citations and comments of Christian and beatified authors. Of Aristotle's position it is needless to speak, for it is matter of common knowledge among all scholars. Warranted by such commanding names, the Law of Nature presented itself as a rule of human conduct independent of positive enactment and even of special divine revelation, and binding always and everywhere in virtue of its intrinsic reasonableness. Modern readers may be inclined to say that this law of nature, about which so much mystery has been made, turns out to be nothing but another name for the general principles of morality[1]. From a modern point of view such a remark is well justified. But we have to bear in mind that ethics, politics, and jurisprudence were anything but clearly divided from one another in medieval thought. In fact the law of nature was of far more importance, both speculative and practical, in the political than in the moral field. And its political value did not escape the keen eyes of those who kept watch for the Church and the Holy See. So venerable a doctrine, though not owing its origin to the Church, could not be disregarded; it must be frankly accepted and supported. The law of nature, being divine though discoverable by secular reason, could not be in conflict with the true faith or with the justice of righteous princes. Thus not only Justinian but Aristotle and Cicero with their commentators were enlisted, by a policy as wise as to us it may seem

[1] Cp. Holland, Jurisprudence, 9th ed., p. 30.

daring, as allies of the Church; and the unqualified supremacy of natural law stands in the very forefront of the Decretum of Gratian[1]. The general authority of the Church was thus confirmed or reinforced; but this did not secure a monopoly of interpretation to any particular official person or school.

From the early part of the fourteenth century onwards, if not earlier, it was found that the law of nature, like other instruments of dialectic, was capable of being a weapon in many hands. Champions of imperial and of papal claims wielded it vigorously against one another. But none of them ever doubted that the law of nature, when its judgment was once ascertained, was supreme over Pope and Emperor alike; though this did not apply to what was called secondary natural law, that is, consequential rules which would or might be reasonable in the absence of positive regulation, but may be modified by positive human law[2]. Appeals to the law of nature were hardly less frequent during the sixteenth and seventeenth centuries in the political and ecclesiastical controversies which followed the Reformation. Like a medieval king, natural law had an indefinite prerogative of jurisdiction ready to be exercised whenever ordinary justice needed to be quickened or supplemented. Its new exercise of power was effected by giving fresh prominence to the most ancient part of the accepted doctrine.

III.

The classical term *ius gentium* had fallen rather out of fashion in the Middle Ages, but there was no reason why it should not be used, and it sometimes was. In the Renaissance period it came into fashion again, and the sixteenth-century writers who are collectively known as precursors of Grotius, though they mostly wrote not as jurists or statesmen but as moralists, used it freely, whether as a synonym for *ius naturale* or with distinctions of their own devising. The classical Roman lawyers had left no clear tradition on the relation of *ius naturale* to *ius gentium*; nor have their successors finally reconciled all the texts. It would be convenient to take *ius naturale* for the sum of rules of conduct which ought to be received because they are reasonable in them-

[1] 'Naturale ius inter omnia primatum obtinet tempore et dignitate. Cepit enim ab exordio rationalis creaturae, nec variatur tempore sed immutabile permanet. . . . Moralia mandata ad naturale ius spectant atque ideo nullam mutabilitatem recepisse monstrantur.'

[2] This is laid down by S. Thomas Aquinas, Sec. Secundae, qu. lvii. *de iure*, artt. 2, 3. The secondary meaning of the law of nature acquired an exaggerated and even exclusive importance, in connexion with the imaginary 'state of nature,' after the scholastic doctrine and its careful distinctions were forgotten. In the eighteenth century Montesquieu could fail to attribute any other meaning to 'law of nature.'

selves, and *ius gentium* for those which are received in fact by the general consent of civilized mankind. This would not prevent the two terms from being practically synonymous in a large proportion of instances, and it is certain that the Roman writers currently used them as convertible. There are traces of a theoretical distinction such as we have now indicated, but the materials are not sufficient for us to say how far it was generally recognized; at least that is the present writer's conclusion from the fact that eminent modern Romanists have differed on the point.

Alberico Gentili, who more than any other one man before Grotius may be called the pioneer of international law, founds himself expressly on this identity of the law of nations (not yet consciously understood in our modern sense) with the law of nature. He quotes the Roman jurists and Cicero by preference, but, though not on terms with the Church, retains so much respect for the scholastic tradition as to refer to the Latin Fathers. He regards the rules of the *ius gentium* as established by the continuing and general consent of mankind, 'quod successive placere omnibus visum est': this being, as he justly notes in anticipation of objectors, the only kind of proof by which unwritten law can ever be established[1]. But the same rules are likewise binding, in Gentili's view, as being prescribed by absolute and evident reason. Universal reason is manifested in the consent of reasonable men. As to the terminology, there is nothing to show that Gentili supposed, or wished any one to believe, that *ius gentium* meant exclusively or eminently the rules binding on states or governments as between themselves. What he says is that princes and rulers in their dealings with one another, even in war, are subject to the rule of natural reason attested by general agreement, which may be indifferently called *ius gentium* or *ius naturae*, according as we lay stress on one or the other element. Herein he assumes that the law of nature is always applicable in its broad principles. It is also generally applicable to provide specific rules, by way of deduction, in default of any other law and without prejudice, where a competent authority exists, to any positive law, not contrary to the universal principles of justice, which may be made by that authority. This is the familiar scholastic distinction, which has been already mentioned, between the 'primary' and the 'secondary' law of nature. In the case of war between independent sovereigns there is no common positive authority; for Gentili, an exiled heretic[2], could not admit that either the Pope

[1] 'Et vero ius non scriptum, ut hoc est, item ut consuetudo, aliter non inducitur.'

[2] Alberico Gentili was 'forced to leave his country for religion' as the Earl of

or the Emperor was entitled to universal jurisdiction; and since the Reformation, at the very latest, it was obvious that neither of them was in fact in a position to exercise it. Hence we are thrown back upon the law of nature not only for ultimate principles but for the whole body of rules which, when discovered, will constitute the *ius belli*. Still the author regards his task as a special problem in applying the law of nature to a class of cases which (as Gentili observes at the outset) has hitherto been neglected by systematic writers. It is the filling up of a gap in the existing framework, not a new construction greater than the old one. So did the whole of commercial law seem to acute English lawyers, far into the eighteenth century, a mere incident in the acquisition of title to personal property.

With Grotius the case is different. Grotius deliberately undertakes a new and large enterprise, and invents or appropriates terms for it. He defines his subject at the outset as 'ius illud quod inter populos plures aut populorum rectores intercedit.' Only Suarez and Hooker, it seems, had attained this clearness of language before him[1], and neither of them had pursued the subject.

For Grotius there is not merely a logical possibility of applying natural law to the facts of war and diplomacy, nor would he be content to say that there is, or may be, a special chapter of natural law dealing with such matters. He sees that the conquest of this new field is not only practicable, but the most important thing to be done. The new development of *ius gentium* is to overshadow—as in the result it did—all its former achievements; the name of 'law of nations' may be given by right of eminence to the science now called forth by the final establishment in Europe of many kingdoms and commonwealths acknowledging no human superior. Grotius may or may not have known that the classical meaning of *ius gentium*, which stands for all rules of conduct sanctioned by general usage, is capable of including whatever rules are customary as between sovereign States, and occasionally did include them in Latin literature[2]. He certainly knew that *gentes* is not the plural of *civitas* or *populus*, which are the only classical words for a state or

Leicester's letter of commendation to the University of Oxford puts it (Holland, Alb. Gent. De Iure Belli, in praef. p. viii), though it does not appear whether the proceedings against him ever reached the stage of final condemnation.

[1] The value of Suarez's insight in the passage quoted by several modern writers (De Leg. II. xix. § 9) which concludes 'ita in universo humano genere potuerunt iura gentium moribus introduci' is rather diminished by his assumption that the rules are very few and simple: 'ea quae ad hoc ius pertinent et pauca sunt et iuri naturali valde propinqua.' Hooker shows a much juster notion of the magnitude of the subject, and indicates the division into rules applicable in time of peace and in time of war. It is tempting to suppose some private intercourse between Hooker and Gentili, but there is no evidence.

[2] H. Nettleship, Contributions to Latin Lexicography, *s. v.*

nation in its political capacity, and he would not have risked such a neologism as *ius inter gentes*. The humanities were still fresh from conquest, and not disposed to be flouted. But Grotius was not above using a certain amount of linguistic artifice to convert the ancient authority of *ius gentium* to his own special purpose. Indeed the artifice was not altogether new. Suarez had spoken of *iura gentium* with what one may call a special international intention; Hooker had actually said in English that the 'third kind of law,' 'which toucheth all such several bodies politic so far as one of them hath public commerce with another,' *is*—not merely may be called, but 'is the law of nations[1].'

Even more remarkable, at first sight, is the language used, a thousand years as nearly as may be before Grotius, by Isidore of Seville. His enumeration, as being *ius gentium*, of such matters as occupation of territory, war, treaties, peace and armisticé, and the sanctity of ambassadors, might be incorporated in a modern text-book with little change[2]. Yet it is certain that whatever was in the mind of the good bishop, preserving as best he might in the wreck of the Western Empire the antiquarian tradition of Festus and Aulus Gellius, anything like the modern law of nations was not. It would rather seem that his examples of general custom—for that is probably the nearest modern expression for what *ius gentium* signified to Isidore—were taken from public affairs, not because he thought them of special importance, but because private law had broken up into a multitude of tribal and personal customs, and it could no longer be said that there was any *ius gentium* in civil matters. The law of the Church was no doubt universal, but the effective assertion of its universality and the definition of its relation to the law of nature were both reserved for a later and more vigorous generation. It is possible, however, that Isidore's words represent a fragmentary extract from some earlier writer made without intelligent attention to the context[3]. If so, nothing but the recovery of the lost context would help us much. Such as it was, Isidore's description of *ius gentium* was copied into the Decretum of Gratian, but without the honours of commentary; and it does not appear to have had any influence on medieval thought or terminology. It is referred to by Alberico Gentili, but, apparently, not by Grotius.

[1] Eccl. Pol. I. x. § 12.

[2] 'Ius gentium est sedium occupatio, aedificatio, munitio, bella, captivitates, servitutes, postliminia, foedera, paces, induciae, legatorum non violandorum religio, connubia inter alienigenas prohibita; et inde ius gentium quod eo iure omnes fere gentes utuntur.' Isid. Hisp. Etym. V. 6 (in Migne, Patrol. t. 40, p. 201); cited and more or less discussed by several modern writers, most profitably, perhaps, by Mr. Westlake.

[3] The ultimate origin was perhaps the passage of Hermogenianus, of which a fragment is preserved to us in D. i. 1, 5.

On the whole, then, the common opinion is justified. The name of Grotius must always be pre-eminent when we speak of the establishment of the law of nations as a distinct body of doctrine. Many different theories have since been put forward, generally determined by the contemporary fashion in moral philosophy, or by the writer's own philosophical predilections, rather than by any specific and appropriate development from within. It may therefore be not quite exact to say, in the accustomed phrase, that all subsequent workers have built on the foundation laid by Grotius. But we may safely say that at all events he assured the site.

FREDERICK POLLOCK.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

A Treatise on the Law of Companies. By the Rt. Hon. LORD LINDLEY. Sixth Edition by the Hon. WALTER B. LINDLEY. London: Sweet & Maxwell, Lim. 1902. Two vols. Royal 8vo. ccv and 1906 pp. (£3 10*s.*)

ON his title-page Lord Lindley says that his treatise is on the law of companies 'considered as a branch of the law of partnership,' and it is not surprising that the author of a great work on partnership law should continue to regard company law as a sort of annexe to the subject which has occupied so much of his attention. He is not the only judge or author who has laid down his version of the law of companies from the point of view that they are partnerships or birds of the same feather. It has been pointed out over and over again that incorporated companies are not partnerships, and those who read the earlier pages of Lindley on Companies should keep prominently in mind what Lord Macnaghten, speaking of companies under the Act of 1862, said in *Welton* v. *Saffery* [1897] A. C. at p. 324: 'These companies are the creature of statute, and by the statute to which they owe their being they must be bound in regard to shareholders as well as in regard to creditors in all matters coming within the conditions of the memorandum of association. . . . Shareholders are not partners for all purposes; they have not all the rights of partners; they have practically no voice in the management of the concern.' It might be added that the liabilities of shareholders are very different from those of partners, and that the doctrine of agency as applied to partners does not apply in the relation between a company and its shareholders. One is not sorry therefore to come to the passages in which the author says, 'A company, so far as it is only a partnership consisting of a large number of persons having a joint stock, and associated for the purpose of sharing profits, is formed in precisely the same manner as any other partnership, viz. by agreement. This matter is dealt with in the volume on Partnership; it is therefore unnecessary here to dwell upon the formation of those companies which, being unincorporated and subject to no special statutory provisions, have nothing to distinguish them from societies the nature and formation of which have been explained in that volume.' In other places in the volumes before us, as well as in his judgments, Lord Lindley shows that he fully appreciates the fact that an incorporated company has an entity separate from its members. Getting away from doctrines of partnership law the author takes up the subject of the formation of companies and the allotment of shares in them, and in the first chapter of Book I he deals with agreements to take shares and does not forget to notice the important provisions of the Companies Act, 1900, with reference to prospectuses and the allotment of shares, but freely criticizes that curiosity of legislation. In his chapter on membership there is a good deal as regards

aliens that, having regard to recent amalgamations, is interesting. Aliens may hold shares in an English company, even though it is the owner of a British ship, in which they could not hold shares—a very good instance of the application of the doctrine of separate entity. Convicts, infants, lunatics, married women, and corporations are also considered in their relations to companies as the holders of shares in them. When he comes to deal with the remedies of persons who have been induced to take shares by prospectuses which were not what they should have been, the author holds out a wholesome warning as to what persons responsible for prospectuses under the Act of 1900 are liable to. He says: 'The Act imposes upon persons responsible for any prospectus to which it applies an absolute statutory duty to comply with its requirements, and the Act does not impose any penalty for the breach of this duty. Therefore it is apprehended that any person responsible for such a prospectus who wilfully disobeys the Act and omits to comply with its requirements is liable to an indictment for such non-compliance.' Then he proceeds to point out the civil liabilities of those who disregard the Act. Throughout the work the Act of 1900 crops up and is duly criticized. The decisions on it are not so much commented on. Decisions on other branches of company law are accepted—not always cheerfully perhaps, as for instance the decision of the House of Lords in *Salomon* v. *Salomon* [1897] A. C. 22.

We have alluded freely to the author, but the preface states that the responsibility for the present edition rests on the editor, who adds that 'he has been assisted in its preparation by the author, who has not only given advice and assistance on the chief points of difficulty, but has revised the sheets as they have passed through the press.' Whoever may be responsible, in the result the labours of the author and his son and editor have produced an edition which is in every way satisfactory, and which will be as often quoted and as widely respected as any of its predecessors. F. E.

Jurisprudence or the Theory of the Law. By JOHN W. SALMOND. London: Stevens & Haynes. 1902. 8vo. xv and 673 pp.

IT is refreshing to find an English book on the philosophy of law written by a comparatively young lawyer (now teaching law at the Antipodes, we doubt not to the great profit of South Australian students) who has really worked at law and is not a slave to formulas. He has the courage to follow consciously or unconsciously a hint given many years ago by Chief Justice Holmes in the American Law Review, and to define law simply as 'the body of principles recognized and applied by the state in the administration of justice.' This implies, no doubt, that the idea of justice is prior to that of law, and that a patriarchal or summary tribunal bound by no rules might be said to administer justice, or at least to have the intention of doing so, though it could not be said to administer law. Legal justice is justice according to rule. Questions as to the actual origin, proximate or ultimate, of rules of law, still more as to the moral and political reasons for their existence, are, as Mr. Salmond rightly sees, collateral.

Again Mr. Salmond, while engaged on a theoretical analysis of the principles of law, does not forget that 'the claims of logic must give way in great measure to those of established nomenclature and familiar usage; and the accidents of historical development must often be suffered to withstand the rules of scientific order.' Again—and this is a great merit—

Mr. Salmond firmly declares at the outset that theoretical jurisprudence is not milk for babes, and should not pretend to be. 'It deals not with the outlines of the law, but with its ultimate conceptions.' It 'is not elementary law, any more than metaphysics is elementary science.' We wish this were fully realized in our seats of learning.

There are few problems of legal principle which the learned reader will not find discussed by our author in such a way as to give him some new light or at least some fresh point of view, and with sufficient but not obtrusive knowledge of what former writers, English-speaking and Continental, have done. We do not say that we agree with Mr. Salmond at every point. For example, we are rather sorry that he has not taken the 'realistic' theory of corporations more seriously (p. 350); its failure to explain that peculiarly English monster the corporation sole is really no failure at all. Neither are we converted by his ingenious construction of a subjective theory of negligence as involving a 'mental attitude of undue indifference.' We need not say that his argument is on a very different level from Austin's crudities, which some English writers still think it worth while to quote.

The subject of Negligence reminds us to mention the one positive error we have observed. The name of that very learned writer Mr. Thomas Beven (not Bevan) is misspelt throughout: a small sacrifice for a careful author's printers to make to the envious gods on his behalf. F. P.

Les Personnes Juridiques dans le Code Civil Allemand. Par R. Saleilles, Professeur à la Faculté de droit de l'Université de Paris. Paris: Chevalier-Maresq. 1902. 8vo. 147 pp.

The German Civil Code deals with corporate bodies in a very restricted manner. *Public* corporations are only dealt with in one section and only as regards one particular point. All the other sections to which Professor Saleilles' book relates deal with *private* corporations only, and only in so far as they are not already governed by other Imperial Statutes. Joint Stock Companies, Partnerships with limited liability, Co-operative Societies, and a number of other societies, owing to this restriction, do not come within the scope of the Civil Code or of Professor Saleilles' book. The corporate bodies which are regulated by the Code are divided into 'Incorporated Associations (Rechtsfähige Vereine),' and 'Incorporated Endowments (Stiftungen).' Any association not belonging to one of the excluded classes may become incorporated by registration, unless it be formed for purposes of profit, in which case its incorporation is subject to the grant of a charter on the part of the federal state within which such association is intended to have its principal place of management.

The registration of an *association* may be inhibited by the state authorities, if the association is of a kind prohibited by law, or if it is established for purposes having a political, social-political, or religious tendency. The incorporation of *endowments* is in all cases subject to State permission. The rules given by the Code relating to both kinds of corporate bodies and contained in ss. 21–89 of the Code are translated and annotated by Professor Saleilles. The author's competent and extensive knowledge of the history of the Code and of the literature relating to its contents has already been mentioned in a notice of his book 'De la déclaration de volonté,' contained in this Review (vol. xviii. p. 315), and

a perusal of the work now before us gives further proof of his right to be classed among the most instructive and suggestive commentators.

The translation is admirable both in respect of its strict accuracy and the lucidity and smoothness of its language; there are only a few points which are open to criticism.

In s. 26 the last sentence is translated 'L'étendue de ses pouvoirs peut avoir été restreinte par les statuts, *et ces restrictions auront effet à l'égard des tiers.*' The German original on the other hand declares that the powers of the board of management may be restricted by the articles '*so as to affect third parties.*' (There are numerous cases in which restrictions of the powers of an agent are permissible but in any event remain without effect as to third parties—see for instance s. 235 of the German mercantile Code dealing with the powers of the managing board of a Joint Stock Company.) According to Professor Saleilles' version it would seem that in the case of an 'incorporated association' every restriction of the powers referred to affects third parties, but this interpretation is clearly incorrect. According to s. 70 restrictions as to the power of the managing board are ineffective as regards third parties, unless registered or known to the party concerned, and even if registered, they do not affect third parties without notice, whose ignorance of the restriction was not caused by their negligence. This fact alone (which by the way Prof. Saleilles ought to have mentioned in the notes to s. 26) shows that a restriction of the powers may be operative as between the board of management and the association, but without effect as regards third parties.

In some instances the author has disregarded the rule that each technical expression should always be reproduced by the same word; for instance, the word 'Amtsgericht,' which is generally translated by 'Tribunal de Bailliage,' is in s. 61 translated by 'Tribunal Cantonal.' Neither expression appears quite suitable, and it would perhaps be better if the German name had been given in the same way as the word 'Bundesrath' is used in the translation of s. 23 and in other places. The word 'Stiftungsgeschäft' is in s. 80 and in other places translated by 'Acte de Fondation,' but in s. 83 the term 'Acte constitutif de la Fondation' is used. These small inaccuracies are noticeable because they are in marked contrast to the painstaking care which the author has otherwise devoted to all parts of his interesting book. E. S.

The Public Health Acts. By W. G. Lumley and Edmund Lumley. Sixth Edition. By Alexander Macmorran, K.C., and S. G. Lushington. London: Shaw & Sons and Butterworth & Co. 1902. La. 8vo. Two vols. Vol. I, clxxvi, 860 and 191 pp.; Vol. II, xvi, 852 and 191 pp. (£3 12*s.* 6*d.*)

Lumleys' Public Health has secured for itself such a position in popular favour that it requires some courage in a reviewer to write of it as other than an excellent treatise. That it has merits is undeniable. We have no reason to doubt that it contains every statute relating to District Councils and their duties, and every reported case (in most instances correctly cited) in any way relating to those statutes; the names of the editors are a guarantee that there will be little, if any, bad law found in the 1712 closely printed pages of text; it is provided with an excellent index and 12 pages of *addenda et corrigenda*; yet it fails to be a good book. The notes contain all the materials for a first-rate treatise, but they are served

up in slipshod fashion. They are just such notes as a busy writer might get his pupil to collect, assuming the pupil to be diligent, undiscriminating, and unmethodical. We miss altogether the work of the master who should arrange and select these notes, and derive from them some principles to guide the reader.

Take for instance the notes on 'Markets,' a thorny subject and one specially requiring careful treatment. The principal statutory enactments on this topic are sections 166 to 168 of the Public Health Act, 1875, and the incorporated sections of the Markets and Fairs Clauses Act, 1847. These sections give local authorities power to provide markets, whose incidents are in many respects different from those of markets created by charter. With the latter District Councils have nothing to do, unless they have exercised their power of purchasing or taking on lease rights in markets and tolls. One would have thought that the first thing to explain was the difference between these statutory and the common law markets, and throughout carefully to distinguish the incidents of the one from those of the other. But no attempt to do so is made, and after a few preliminary matters the editors blandly set out in full the head-note of *A.-G.* v. *Horner* (11 App. Ca. 66), a case turning almost entirely on the interpretation of a charter, and one which can have only the remotest connexion with statutory markets. Then follows a report of a case quoted from the *Times*, in which Day and Lawrence [*sic*] JJ. appear to have decided that proof of a custom to obstruct a highway on the day of an annual fair was no evidence of a custom to obstruct the highway on the day preceding the fair. Would it not have been better to substitute for such a self-evident and irrelevant proposition some reference to *Elwood* v. *Bullock* (6 Q. B. 383), and a general statement of the circumstances in which obstruction of a highway by a market may be justified? Thus a Council providing a new market would have had some chance of finding out that obstruction of a highway by such market can in no circumstances be justified. Then the note proceeds to deal, in the same hap-hazard way, with removal of a market, setting out at length the head-note of *Rex* v. *Starkey* (7 A. & E. 95), in which removal of a market in particular circumstances was held bad, but giving no exposition of the circumstances in which a market may be lawfully removed, and no kind of explanation as to whether a market established in a market-place provided by a District Council is removable at all, and if so, how, and in what circumstances.

Next we come to Disturbance of a Market. The editors set out the head-note of *G. E. Ry. Co.* v. *Goldsmid* (9 App. Ca. 927) in full, without stopping to consider that it is of no general interest to local authorities to know that a certain charter granted by Edward III to the Corporation of London has the force of a private act of parliament. It would have been much more to the point to have stated what acts at common law amount to a disturbance of a market, and that *Mayor of Birmingham* v. *Foster* (70 L. T. 37) and *Stevens* v. *Chown* ([1901] 1 Ch. 894) show that an action for damages and for an injunction lies in respect of, at any rate, some acts which would be a disturbance in the case of a common law market.

The notes on section 13 of the Markets and Fairs Clauses Act, 1847, are equally bad. That section imposes penalties upon a person selling tollable articles in any place within 'the prescribed limits,' except in his own dwelling-place or shop; and it has given rise to numerous decisions. Thereon the author has written some two pages of notes referring to scores of cases, many of them quite unworthy of notice—such as *Shepherd* v. *Folland* (49 J. P. 165), that potatoes are 'provisions' within the meaning

of some local act, and *Loftos* v. *Gleave* (55 J. P. 149), that under some other local act a pedlar does not require a license to sell hat guards. Most of the cases of any general interest turn on the question, what is a man's own dwelling place or shop? or on the question, what constitutes 'a sale' within the prescribed limits? It is not difficult to extract from the cases on these questions a few rules which would have been infinitely more useful than the lists of cases with summaries of the facts of each which over-load and confuse the note.

The most important point of all, what is meant by 'the prescribed limits' in the case of a market provided under the Public Health Act, was decided in *Spurling* v. *Bantoft* [1891] 2 Q. B. 384, but this case is not referred to in this connexion, nor is any help given upon that crucial point.

For one piece of information in the Addenda we are grateful. We quote it verbatim:—

'Page 250, add to note (*a*) "A fair and a market may coexist (*Newcastle (Duke of)* v. *Worksop Urban District Council*, 37 L. J. Notes, 218; [1902] W. 6 [*sic*] 112 L. T. Newsp. 546; 18 T. L. R. 472)."' Who ever doubted they could? Even a cursory reading of the short report in the *Weekly Notes* would have shown that this was not what Farwell J. decided.

No doubt some portions of the work are very much better done than those we have selected for comment. But most of the notes might with great advantage be revised and rewritten throughout. Till this is done each edition is likely to be worse than its predecessor, and we earnestly hope that it may be done whilst the work remains in the capable hands of its present editors. There is no more dangerous temptation than excessive respect for a former editor's work. If that editor was oneself there is no excuse.

Outlines of Criminal Law. By COURTNEY STANHOPE KENNY, LL.D. Cambridge University Press. 1902. 8vo. xxii and 528 pp.

WE think that Dr. Kenny is wrong in considering that any excuse is necessary for embodying in the form of a book the lectures on criminal law which he has delivered at Cambridge during the past quarter of a century, and from which many now practising at the Bar must have gained their first knowledge of the subject.

Dr. Kenny is careful to point out that he has aimed at making his range of topics 'no wider than may be grasped upon a first perusal even by a reader previously unfamiliar with law,' but we are inclined to think that in these latter days it would be well to include in the Cambridge course some exposition of sections 81–85 of the Larceny Act, which deal with frauds by directors, officers and members of public companies, and of which we can find no trace either in the table of contents or the index.

The subject of *mens rea* is a difficult one, and at first sight the maxim 'ignorantia juris non excusat' sometimes seems to conflict with the maxim 'actus non facit reum nisi mens sit rea.' Dr. Kenny appears to us to attach too much importance to the prisoner's *knowledge* that the act done is criminal or at any rate immoral. When the cases are examined carefully does *mens rea* amount to anything more than an intention to do an act which *the law says* is criminal or immoral? In *R.* v. *Tolson* (23 Q. B. D. p. 168) there was no intention by the defendant to do what the law says is criminal, viz. to go through the form of marriage with another person

in the lifetime of her husband. She never intended to do any such thing, because at the time of the ceremony she had a bona fide belief on reasonable grounds that her husband was dead. In *R.* v. *Prince* (L. R. 2 C. C. R. p. 154) there was undoubtedly an intention by the prisoner to do an act which the law says is immoral, namely, an intention to take an unmarried girl out of the lawful care and charge of her father, which is sufficient in the eyes of the law to constitute *mens rea*. Again in *R.* v. *Senior* ([1899] 1 Q. B. 283) the defendants intended to abstain from calling in medical aid, an omission which the law says is an unlawful one. *Mens rea* was therefore present, and it is submitted that the fact that they thought their inaction was highly moral or that they did not know that it was criminal would be quite immaterial. The most recent judicial definition of *mens rea* is that of the Judicial Committee of the Privy Council in *Bank of New South Wales* v. *Piper* ([1897] A. C. 383).

The very interesting subject of doing acts calculated to interfere with the due course of justice which was elaborately considered by the Court for Crown Cases Reserved in *R.* v. *Tibbits* ([1902] 1 K. B. 77), has not been touched on, although in these days of evening newspapers it is undoubtedly one of growing importance to those who practise at the Criminal Bar. Taken as a whole the book is a worthy companion to the 'Selection of Cases illustrative of Criminal Law,' recently published by the same author. The subjects selected in Book II seem to be dealt with clearly and accurately, are illustrated by well-chosen and recent cases, and we can only express the wish that their range was wider. Book III contains an adequate summary of the modes of judicial proof, and in Book IV will be found an account of the various criminal courts of this country, and of the ordinary procedure adopted therein. At the commencement and the end of the volume will be found some interesting chapters on the nature of a crime, the purpose of criminal punishment, and the problems of punishment, which will, however, we think, prove more useful to 'young men preparing for the academical or professional examinations' than to those 'older men called upon to undertake without previous legal training the duties of a justice of the peace,' the majority of whom will probably be content to take their criminal law as they find it in Archbold, without studying too deeply its evolution in Sir Henry Maine's Ancient Law, or considering in detail the Italian School of Criminology, the subject of Recidivism, and the Clameur de Haro.

Conveyancing Forms and Precedents. By Edward Parker Wolstenholme, M.A., one of the Conveyancing Counsel of the Court, and Walter Evelyn Capron, LL.B. Sixth Edition. London: Wm. Clowes & Sons, Lim. 1902. 8vo. xxxii and 420 pp. (21*s.*)

These forms and precedents are based on the same conveyancing manuscripts as were passed down through the late Mr. Christie from past generations of conveyancers to Mr. Wolstenholme, the late Mr. Charles Davidson, and others. It might have been better if in other modern books of precedents more attention and respect had been paid to the old common forms, there would then have been more uniformity in practice and less difficulty would be now experienced in advising on points of construction.

Any one who knows this book will not suppose that a proper regard for the old forms necessitates any useless length, indeed the present edition

is a model of concise and accurate drafting. No one knows the rule 'Where you get long you may know you are wrong' better than the authors.

The notes have been considerably enlarged since the last edition, and an immense amount of careful work has been put into the book to bring up to date both the text and the notes. That the edition is a real success is beyond question, and the profession will be sorry to learn that Mr. Capron, as he is retiring from practice, will be unable to see and superintend the use of the many new forms and suggestions made in it.

It is difficult to find anything in this edition which is open to fair criticism, but it may be useful here to refer to a few matters of particular interest.

At pp. 121 and 172 a new power, by reference to s. 63 of the Settled Land Act, 1882, is given to lease and manage land held on trust for sale. The power is long and, it is submitted, is somewhat more complicated than strictly necessary. Thus if the powers were conferred by reference to the Acts generally it would be unnecessary to say that it is to be exercise-able without an order of the court. Presumably the reference to s. 63 is intended to bring in the provisions of that section relating to capital money, but this can be better done by saying so expressly. Again, reference is made to the powers of management given by s. 42 of the Conv. Act, 1881; now if it is necessary to refer to these it follows that during a minority the trustees of a settlement have greater powers than an adult tenant for life, which it is submitted is not the case. Further, seeing that originally under the Act of 1882 a tenant for life of the proceeds of sale had all the powers of an actual tenant for life, and can now obtain them under an order of the court, there seems to be no sufficient reason why the trustees should not be given the same powers.

Thus, by not giving the powers incidental to the power of sale, the clause would not render unnecessary applications to the court under s. 44 of the Trustee Act, 1893. It may be admitted that where the surface and minerals are to be dealt with separately the scientific way is to mention this in the trust for sale, but this adds considerably to the length of the form, and for practical purposes a reference to all the powers conferred by the Acts is sufficient.

At p. 102, line 3, the words 'and until' appear to have been left in by mistake, a joint appointment by husband and wife cannot be made after an appointment by the survivor. The trust for children takes effect 'until . . . any such appointment,' that is an appointment by both *or* by the survivor.

The power (p. 117) to purchase land does not seem to authorize the acquisition of perpetual rent-charges; this might be conveniently added.

The new name and arms clause (p. 135) seems to be a great improvement on the old forms, which by reason of the exceptions from time to time inserted therein had become complicated.

Another great improvement will be found in the form (p. 150) of the trusts for the settlement of chattels as heirlooms, which now enables a valid resettlement to be made of them by the tenant for life and tenant in tail in remainder, and at the same time prevents the heirlooms vesting in the latter if he dies without becoming entitled in possession and without barring the entail in the freeholds. The same scheme is now applied (pp. 147–8) to the settlement of leaseholds on trusts corresponding with the uses of the freeholds. As this form varies somewhat from the directions contained in S. L. A., 1882, s. 24 (3), it might be well in the settlement to

direct that where capital money is invested in the purchase of a term of years it shall be conveyed on the trusts shown in the form.

It remains to thank the authors for the assistance this edition will afford to the profession, and to advise every conveyancer who does not possess a copy to purchase one forthwith. To those who do not habitually use the book the best advice is to read it carefully: they will probably find many ways of carrying through transactions which are better than those they are accustomed to, and possibly that they have occasionally been making mistakes.

Hood and Challis' Conveyancing and Settled Land Acts, &c. Sixth Edition. By P. F. Wheeler, M.A., B.C.L., assisted by J. I. Stirling, M.A. London: Stevens & Sons, Lim. 1901. 8vo. lvii and 641 pp. (20*s.*)

This is a careful edition of a well-known work. It used to be said 'If you want to know what the Acts do not do look at Hood and Challis' book, and if you want to know what you can do look at Wolstenholme's book.' However no one can properly say this of the present edition, which deals with the Acts from all points of view; if it errs at all it is because it is too exhaustive.

The dissertations are undoubtedly long for a work of this nature, and though this may be of value to students, the busy practitioner may sometimes sigh for something which is a little more concise and to the point.

In the discussion respecting the decision in *Gosling* v. *Woolf* at p. 15, the authors seem to have overlooked the fact that, when the facts are understood, no question appears to arise as to the correctness of the decision, but that it is merely the dictum on s. 3 of the Conveyancing Act, 1881, ignoring the distinction between the grant of a term (see s. 13) and the assignment of a term (see s. 301) which gives trouble.

The authors seem in their notes on s. 18 of the Conveyancing Act, 1881 to have passed by the difficulty of deciding whether a mortgagor in possession has power to accept a surrender of a lease so as to bind his mortgagee, and enable the mortgagor to grant a lease in possession, see subs. 5; perhaps we may look forward to a useful note on this point in the next edition.

The wisdom of setting out the whole of the Land Transfer Act, 1897 when only short notes are given on some of the sections affecting the general law is doubtful; it merely seems to add to the length of the book without conferring any advantage, for the part of the Act relating to registered land is of no practical value without the Act of 1875.

However the arrangement of the book as a whole is admirable, and the authors must be cordially congratulated on the production of a useful edition.

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.

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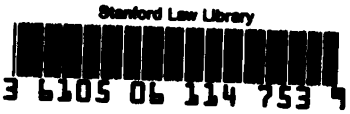

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